89-555

Supreme Court, U.S.
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NO.

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IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

PETITION FOR WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Sec. 24 of Art 10 of the Texas State Bar Rules, *reprinted in Appendix to Tex. Gov't Code, Title 2, Subtitle G* (Vernon 1988), as written and/or as applied in this case, violates the Fifth, Fourteenth and/or possibly the Eighth Amendments to the Constitution of the United States, because it provides for a ***blanket*** ban on supersedeas pending appeal by an attorney from a judgment of suspension by a trial court, even though the purported grounds for suspension do not pertain to a crime or accusation involving moral turpitude but involve only hypertechnical constructions of the State Bar's advertising rule; the suspended attorney has not been shown to constitute a threat of harm to his clients, potential clients or the public; and, though challenged to do so in the trial court, the State Bar wholly failed to offer any evidence or make

any effort to establish a legitimate state or police power reason for imposing such a blanket ban on supersedeas.

II.

Whether the failure of Section 24 to provide for, and the failure of the trial court to conduct, an evidentiary hearing on the question of the propriety of supersedeas violates Petitioner's rights under the Equal Protection and Due Process Clause of the Fourteenth Amendment.

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4. Detailed Article Concerning "Masters of Disaster" Investigation.
5. O'Quinn Complains of Selective Prosecution; Discusses Appointment of Special Prosecutor.
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AA-3.Excerpts From Brief Of State Bar In State Court Of Appeals, Demonstrating That State Bar Does Not Contend That Musslewhite Poses Threat Of Harm To Clients Or Public.

BB-1.Gloria Chaplin's Affidavit, Establishing Harm To Clients Resulting From Improvident Suspension Of Musslewhite.

BB.2.Ms. Chaplin's Trial Court Testimony To Same Effect.

CC.Excerpts From Trial Court Uncontradicted Testimony Of Musslewhite and Newman Demonstrating That Musslewhite Objected To Running Of Ad And Sending Of Letter Re Piper Alpha Matter.

DD.Articles Concerning Selective Prosecution, Including Comments About The State Supreme Court's Observations Re Selective Prosecution.

EE.Excerpts From Briefs Filed By Musslewhite In State Court Of Appeals, Discussing Points Of Error, etc.

REFERENCE TO OFFICIAL ORDERS, JUDGMENTS AND OPINIONS DELIVERED BY THE COURT BELOW

1. The judgment of suspension of the state trial court, dated Nov. 21, 1988, suspending Petitioner for three years, effective Jan. 31, 1989. (Appendix A).

2. The order of the state trial court, dated Jan. 12, 1989, denying Petitioner's Rule 47 (of the Texas Rules of Appellate Procedure) Motion, requesting supersedeas of the judgment of suspension. (Appendix B).

3. The order and opinion of the state court of appeals, dated Jan. 19, 1989, denying Petitioner's petition for a writ of mandamus, mandamusing the trial court to grant supersedeas of the judgment of suspension. (Appendix C).

4. Order of the supreme court of Texas, dated Jan. 25, 1989, denying petition for writ of mandamus, requesting that the trial court be mandamused to grant supersedeas of the judgment of suspension. (Appendix D).

5. Order of Justice Byron R. White, dated Feb. 16, 1989, denying first Application for One Justice Stay of the

judgment of suspension and/or for mandatory relief, requiring the trial court to grant supersedeas of the judgment of suspension. (Appendix E).

6. Order of the state court of appeals, dated Feb. 16, 1989, denying the Petitioner's Rule 49(b) (of the Texas Rules of Appellate Procedure) Motion, requesting the court of appeals to immediately reverse the trial court's denial of supersedeas and grant Petitioner supersedeas of the judgment of suspension. (Appendix F).

7. Order of the supreme court of Texas, dated June 14, 1989, denying the Petitioner's third petition for writ of mandamus, requesting the supreme court, following the court of appeals' denial of the Rule 49(b) Motion, to mandamus the trial court or the court of appeals to grant Petitioner supersedeas of the judgment of suspension. (Appendix G).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The final judgment of the state's highest court, the supreme court of Texas, denying relief with respect to Petitioner's request for supersedeas pending appeal of the judgment of suspension, was entered on June 14, 1989. This Petition for Writ of Certiorari is being timely transmitted within ninety days of the final judgment of the state's highest court with respect to the supersedeas question. The jurisdiction of this Court is invoked under 23 U.S.C. 1257, as amended June 27, 1988. See *Orr v. Orr*, 440 U.S. 268 (1979). Pursuant to Rule 24.4(e) of the Rules of this Court, the attorney General of Texas was served with three copies of this Petiton for Writ of Certiorari (as well as to the General Counsel of the State Bar of Texas).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES WHICH THIS CASE INVOLVES

This case directly involves the Fifth, Fourteenth and possibly the Eighth Amendments to the Constitution of the United States and

indirectly the First Amendment of the U.S. Constitution. It also directly involves Sec. 24 of Art. 10 of the Texas State Bar Rules, supra, and indirectly involves Sections 22 and 26 of Art. 10 of those Rules and DR 2-101 and DR 2-107 of the Texas Disciplinary Rules. (All of such provisions of the State Bar Rules and Disciplinary Rules are contained in Appendix H).

STATEMENT OF THE CASE

The State Bar of Texas, Respondent herein, harassed the Petitioner for several years leading up to 1986, but without success. Their essential complaint about Petitioner was that he allegedly engaged in solicitation, primarily of victims of mass disasters and potential clients in toxic tort litigation. The Petitioner denied these charges throughout. As events finally clarified things, it became obvious that the real basis for the decade long vendetta against Petitioner was that certain power structures within the State Bar did not like the way Petitioner exercised his First Amendment rights. What rankled them most was that

Petitioner routinely conducted television press conferences in connection with mass disasters and other controversial litigation. See discussion, infra. Because of these high profile activities, the Petitioner was unpopular not only with the insurance industry-chemical company, business interests and their law firms but also with a powerful clique within the plaintiffs' bar, overly concerned with their own image rather than protecting victims and getting them justice.

In late 1985, as the "tort reform" drive with regard to the 1987 session of the Texas legislature opened up, the State Bar announced it was "investigating" several Houston lawyers for alleged illegal "solicitation" practices but, in fact, it only identified three of the targets, who, not coincidentally, were the same three who were the *only* three Texas lawyers on the national Agent Orange Plaintiffs Management Committee ("AOPMC"), namely Petitioner, John O'Quinn and Newton Schwartz.[1] See App. I-1 thru 4, 7, 8.

1. The nine member AOPMC was charged with the responsibility of conducting the national class action involving Agent Orange claimants

(The "App." references are to the Appendices filed in connection with this Petition, under separate cover.)

The "investigation" of these three lawyers took on a dark force, unparalleled in Texas Bar history. The matter was referred to a very aggressive grievance committee, Committee 4-C (not the one under local rules that should have handled the investigation of these three attorneys); that committee prevailed upon the State Bar Board of Directors to take the unprecedented step of hiring a special prosecutor, Tom Alexander, to prosecute *only* Petitioner, O'Quinn and Schwartz; Alexander, as had members of Committee 4-C and other State Bar officials before him, began to publicly denigrate these three lawyers and to conduct the "investigation" and trial in the press;[2] and Alexander,

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in Brooklyn, New York, *In Re Agent Orange*, MDL 381, E.D.N.Y.

2. Alexander referred in the press to Petitioner, O'Quinn and Schwartz as the "masters of disaster"; as having a "network" of "runners"; and engaged in constant "leaks" to the press calculated to seriously prejudice the rights of the three. See App. I-9 thru I-17.

without providing them with a hearing as required by Sec. 10(E) of Art. 10 of the State Bar Rules, sought disbarment of Petitioner and O'Quinn, alleging illegal solicitation and fee-splitting.[3]

Petitioner did not know at that time that he had been selected as the "scapegoat" and sacrificial lamb on the alter of this grand inquisition and O'Quinn and Schwartz, as well as all others, had been made "sacred cows" by the General Counsel, Mr. Steve Peterson.[4]

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3. See App. J, the petition in Petitoner's case, and App. K, the petition in O'Quinn's case. The State Bar also sued Schwartz but on the basis of mishandling client funds.

4. One explanation for this is that probably no other attorney in Texas has been involved in as much controversial litigation. E.g., the Agent Orange, PCB, Liberty Waste Dumpsite, Bhopal, Ocean Ranger, Ranger I and Arrow Air litigation. Also, in 1982, Congress passed an amendment to the Jones Act, 46 U.S.C. 688(B), one of the most chauvinistically unconstitutional bills ever passed, which excluded foreign seamen working on American offshore drilling vessels from Jones Act coverage. This bill was derisively referred to by the insurance company interests as the "Musslewhite amendment". Petitioner was involved in the Agent Orange litigation throughout and was to be one of the five attorneys to conduct the trial; O'Quinn and Schwartz were brought into the litigation by Petitioner at a much later date and then principally only to help finance the litigation. See App. I-32. Petitioner was the only one of the nine AOPMC members who turned

This all began to come to light through a combination of events. First, the Respondent filed another disbarment suit against Petitioner (but not against O'Quinn and Schwartz), basing it upon patently frivolous client complaints centered around Petitioner's alleged failure to return telephone calls. Respondent undertook this harrassment when it had all along stated, in its brochure to potential complainants, that the failure to answer telephone calls was not generally an appropriate ground for prosecution. See App. L. This disbarment suit was instituted by the infamous Committee 4-C, without giving

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against the settlement with the chemical companies and he became very controversial for doing so. Petitioner filed suit in Texas in the controversial Bhopal litigation; O'Quinn and Schwartz were not involved in that case. Petitioner initiated the high-profile Liberty Waste Dumpsite litigation. Schwartz was not involved and O'Quinn was only later brought into it by Petitioner, again principally for the purpose of financing the litigation. Petitioner was on the Plaintiffs' Committee in the Ocean Ranger litigation and Schwartz was not involved and O'Quinn only at the very end, at the request of Petitioner. But, as to the disbarment allegations, Petitioner and O'Quinn were similarly situated; indeed, the allegations against O'Quinn were much more serious. Compare Apps. J and K and see App. see I-8 thru I-11, 12, 13 and 16.

Petitioner the hearing required by Sec. 10(E), Art. 10 with regard to two of the complaints and despite the fact that the committee that was supposed to handle the complaints, Committee 4-A, had recommended only a reprimand in connection with such types of complaint. See App. M.[5]

Unbeknown to Petitioner until later, Steve Peterson, the State Bar General Counsel, negotiated a sweatheart deal with O'Quinn's attorney, David Berg, who himself had been the chairman of one of the grievance committees. The deal provided that O'Quinn would receive only a reprimand. See App. I-17 and I-5. But this secret deal was stopped by

5. O'Quinn sought, pursuant to Art. 10, Sec. 5(f)(5) of the State Bar Rules, a transfer from Committee 4-C (because of their leaks to the press and violations of the State Bar Rules concerning confidentiality) and it was eventually granted by the Disciplinary Review Committee ("DRC"), but Petitioner's request, made on the same grounds as O'Quinn's, was not acted upon by the DRC and was never granted. See App. N. Indeed, Franklin Jones, Jr., Chairman of the DRC, testified that Committee 4-C proceeded to file suit against Petitioner before the DRC could act, even though the General Counsel, Steve Peterson, had promised Mr. Jones that they would not do so until after the DRC had acted on Petitioner's motion to transfer.

Alexander, the special prosecutor. So O'Quinn took out after Alexander and, finally, was able to convince the State Bar Executive Committee to discharge Alexander. See App. I-14, 15 and 17.[6] As we shall see, infra, it was only a matter of time before the General Counsel would carry out his pre-Alexander deal to give O'Quinn a reprimand.

In the meantime, in this climate of hysteria and highly prejudicial pre-trial publicity,[6A] Petitioner's case was the first

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6. Alexander was called by members of the Executive Committee a "runaway prosecutor" who was employing "vigilante" tactics. See App. I-14 and 15.

6A. Alexander and other officials of the State Bar repeatedly resorted to one of the most vicious of the old tactics of McCarthyism, guilt-by-association. Petitioner and O'Quinn had separate practices and, though they worked together frequently, both had their own separate inventory of cases and sources of business. Every time the Respondent would castigate O'Quinn in the press - about alleged jury tampering, bribery of witnesses, maintenance of runners, etc. - Petitioner would be mentioned as if he were a part of those allegations (when in fact he was not). See App. I-8, 9, 10, 11, 13 and 16. The best example of this was the repeated reference in these press reports to O'Quinn's purported relationship with one James McNeilly, an alleged "runner". The Petitioner would be mentioned in those same articles in the context of the overall "solicitation" prosecution, as if McNeilly had implicated Petitioner, when in fact - as Alexander, his

of the three cases set for trial.[6B] Petitioner sought to have venue changed, see App. P-1, and, in the alternative, to have the jury venire-persons questioned separately concerning the effects upon them of the publicity. See App. P-2. Judge Casseb, the visiting judge appointed for the case and a very hostile judge at that, denied these and all other of Petitioner's pre-trial motions.[7]

Petitioner had been fighting with the

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investigator, Clyde Wilson, and the State Bar officials all knew - Petitioner had never in his life even met McNeilly, much less had any business dealings with him, as O'Quinn apparently had. See App. R. Indeed, Alexander falsely stated to the press that "the three attorneys (referring to O'Quinn, Petitioner and Schwartz) allegedly used a network of runners - *including McNeilly* - to solicit clients at disasters." App. I-9. Alexander knew when he made that statement that Petitioner had never used McNeilley as a "runner", and did not even know McNeilly.

6B. Petitioner's case was set for trial on Nov. 7, 1987. O'Quinn's case was never set for trial and Schwartz' was postponed to July of 1989.

7. Judge Casseb, the *Pennzoil v. Texaco* trial judge, had no sooner been named as judge in Petitioner's case when the Respondent rushed to name Joe Jamail, Pennzoil's lead counsel, as an "expert" against Petitioner. He was not named as an expert in the O'Quinn or Schwartz cases.

State Bar since the middle 1970's; it had been expensive and financially debilitating; it was interfering more and more with Petitioner's ability to effectively represent his clients; and the unrelenting pressure was having a deliterious effect upon his family. Moreover, because of Judge Casseb's adverse rulings, Petitioner was facing trial in a jury environment made highly uncertain by the trial-in-the-press tactics of the Respondent, Committee 4-C and its special prosecutor, Tom Alexander (he was forced to resign just two weeks before Petitioner's trial). See App. I-14, 15 and 17. And he was facing trial before an extremely hostile judge. For all those reasons, Petitioner resolved to settle his differences with the Respondent even though he was not guilty of any of the charges.[8]

On the date of trial, Petitioner naively

8. We have discussed how the "telephone call" cases were frivolous even under the State Bar's own standards. The "solicitation" case was just as frivolous. The Respondent named seven alleged runners. See App. J. But Respondent knew that they were not runners. Three were clients who properly referred Petitioner cases; one was the leader of a legitimate veterans organization who referred cases because of Petitioner's work in the Agent Orange litigation; and two, who had

entered into a compromise with the State Bar (hereinafter "Agreed Judgment"; see App. Q), which provided for a 90-day suspension and a three-year probation. Petitioner's probation could be revoked if Petitioner violated any of the disciplinary rules in the future and if Petitioner violated a clause stating that, for one year, Petitioner would have to refer

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formerly been connected with the National Maritime Union, properly developed business for Petitioner through lawyers, unions and other legitimate organizations and groups (primarily involving foreign plaintiffs). With regard to the seventh, James McNeilly, Petitioner had never met him in his life and had never done business with him in any way. See App. R. In addition, the Petitioner and Respondent had agreed to consolidate the "telephone call" cases with the "solicitation" case, so that Petitioner would not have to bear the expense of more than one trial. But on the date of trial, the Respondent announced "not ready" for trial of the "solicitation" case and moved to postpone it to a later date, thus forcing the Petitioner to the heavy expense of two trials instead of one. Judge Casseb, despite having denied Petitioner's motion for continuance, granted the Respondent's motion. See App. R. The fact is, as born out by subsequent events, Respondent knew then that the "solicitation" case was frivolous and that it would never be ready for trial in that case. See discussion, *infra*. Moreover, *when the* settlement was announced, the Petitioner made it clear he had not pleaded guilty to any charge and that the settlement was a *compromise* and nothing more than that. See App. 18.

out to other lawyers all new cases taken in during that period (this clause will be hereinafter referred to as the "Referral Clause"). The Agreed Judgment included another provision, one that Peti- tioner welcomed and had asked for: the court would appoint a custodian who would have the duty to review all of the cases Petitioner had on hand and, if the custodian found any cases improperly solicited, he was to report them to the court and Petitioner would have to forfeit his fees in those cases. Just how frivolous Respondents' "solicitation" case was, becomes apparent from the fact that, after nine months of reviewing Petitioner's cases, *the custodian did not report a single case as having been improperly solicited.* See affidavit, App. R. This complete exoneration included the cases mentioned so repeatedly in the news articles generated by the Respon- dents' trial-in-the press tactics, such as the Agent Orange, Arrow Air, Bhopal, Ocean Ranger, Liberty Waste Dumpsite, and Dallas/ Ft. Worth aircrash cases. See e.g., I-1 thru 4 (particularly 4), 6-8 and 32.

Petitioner complied assiduously with the terms of the probation but it soon became apparent just what Respondent really had in mind for Petitioner. At the outset, it should be pointed out what the Agreed Judgment did not contain: it did not contain a waiver of the provisions of the State Bar Rules for the handling of any alleged future violation of the disciplinary rules, including the right of trial by jury (see Secs 10-23 of Art. 10 of the State Bar Rules, and Sect. 81.077(a) of the Texas Govt. Code, Judicial Branch); it did not contain a waiver of due process or of Rules 99 and 245 of the Texas Rules of Civil Procedure with respect to minimum time periods for service of petition to revoke probation and appearance by Petitioner (1st Monday after expiration of 20 days from date of service of petition) and for setting of trial on the merits of the petition to revoke (at least 10 days *after* appearance); the Agreed Judgment did not contain a waiver of Petitioner's First Amendment rights and specifically did not require Petitioner to stop using press conferences and the

television in the manner in which he had been doing so in the past;[9] and, finally, the Agreed Judgment did not contain an outline of the precise mechanics as to how Petitioner would have to make referrals during the first year of the probation in order to comply with the Referral Clause.

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9. As mentioned above, Petitioner's modus operandi was to use press conferences and television interviews at or near the scenes of mass disasters or in connection with toxic tort class action litigation (e.g., Ocean Ranger, dumpsite cases and Agent Orange). The press conferences and interviews always took place at least several days ***after*** the accident or event and were targeted toward other lawyers or citizens groups and ***never***, and we emphasize ***never***, toward individual victims or their families. The purpose of these press conferences, in the case of foreign mass disasters such as Ocean Ranger (and Piper Alpha), was to advise solicitors or lawyers in the area of the potential for litigation in the U.S., usually Texas because of its liberal forum non conveniens law. See Sec. 71.031, Texas Civil Practices and Remedies Code and a discussion of it in ***Chick Kam Choo v. Exxon***, 817 F.2d 307, 314-316 (5 Cir. 1987), rev'd, ***Chick Kam Choo v. Exxon***, 100 L.Ed.2d 127 (1988). In the case of toxic tort litigation, the purpose of the press conference was to inform the personal attorneys for members of the particular class, whether the class involved those living around a dumpsite or a group such as the Agent Orange veterans, of their potential rights. Petitioner has never, in his life, advertised for business directly from potential clients, even though such advertising is permitted by Supreme Court law.

The new assault on Petitioner began immediately with the entry of the Agreed Judgment on Jan 29, 1988. Judge Casseb let it be known through one of Petitioner's attorneys that he did not like the fact that Petitioner had held a press conference in connection with the announcement of the Agreed Judgment. See App. R and I-18.[10] Then, in June of 1988, Petitioner participated in a press conference announcing the filing of a new Agent Orange class action suit involving Vietnam Veterans who died or manifested their injuries *after* May 7, 1987, the date the settlement of MDL 381 was tentatively agreed upon. (The new suit will hereafter be referred to as the "Hartman Agent Orange case"). See App. I-19. Steve Smoot, Assistant General Counsel reacted adversely to the Agent Orange press conference, stating he was going to look into

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10. Accepting 90 days suspension and three years probation for unprovable charges was a bitter enough pill for Petitioner to swallow and he was simply trying to mitigate the damage by making it clear to the press that he had not pleaded guilty to any charge, that he was admitting no guilt and that he agreed to the settlement so that he could get the State Bar off his back and get on with his life and his law practice.

the Hartman Agent Orange case, obstensibly on the ground that Petitioner may have violated the Referral Clause.[11]

Then in July of 1988, about ten days after the tragic Piper Alpha disaster, Petitioner and a lawyer from Houston by the name of Kelly Newman met with some Scottish solicitors who had referred cases to Petitioner in the past and who had been hired by some of the Piper Alpha families. Because these solicitors felt that many of the other solicitors were uncertain about potential jurisdiction in the United States and, further, they were concerned about the drive for an improvident package settlement being engineered by a

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11. This of course was ridiculous because Smoot was advised that the Hartman case was referred to Wayne Mansulla of Wash., D.C., which referral was confirmed in writing. See App. S (which were official, uncontradicted exhibits in the revocation trial). Moreover, since Petitioner had been involved as an attorney in the Agent Orange class action litigation since 1980 and was still then the lead attorney in a class action suit involving all Vietnam Veterans pending in the Claims Court of the U.S. (*Sharkey v. U.S.*, Cause No. 697-84C, Claims Court of the U.S.), it was undisputed that Hartman, a member of the *Sharkey* class, was constructively already Petitioner's client when the Agreed Judgment was entered into, thus meaning that his case was not covered by the Referral Clause.

a group of other solicitors working with the American firm of Speiser and Krause, Petitioner and Newman decided to have a press conference and discuss those matters. The press conference was held, see App. 20, and the reaction of the General Counsel's office, the State Bar President and the custodian, Hartley Hampton, was instantaneous, precipitate, hysterical, unprofessional and demonstrated not only a prejudgment without having any of the true facts in hand but confirmed once and for all that what the State Bar had really always wanted to do with Petitioner was to strip him of his First Amendment rights, eliminate his modus operandi which obviously offended the establishment of the Bar, and stop him from utilizing press conferences and television interviews in connection with mass disasters and controversial litigation.[12]

12. See App. I- 21-23. 25 and 26. Smoot, without knowing anything except what he had read in the press, stated that "he would (not *maybe* after proper investigation) be filing a motion with the Court this week to revoke Mr. Musslewhite's probation." App. I-30. James Sales, President of the State Bar (and whose firm, Fulbright & Jaworski, represents the largest subsidiary of Occidental, the target

The *Texas Lawyer*'s analysis of the Repondent's actions homed-in on the underlying motive of the State Bar:

> "In addition to the Piper Alpha activities (referring primarily to the *press conference* in Aberdeen), the Bar's petition (to revoke) cited a June 22 *press conference* in Washington, D.C., where Musslewhite announced his involvement in new Agent Orange litigation . . . . . .

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defendant in the Piper Alpha matter), stated, again only having in hand press reports, that he understood that "a ring of Houston Lawyers" (including Petitioner) were "soliciting clients from the July 6 explosion" and that such group "seemingly has tentacles that may reach back to prior incidents in the U.K., North Sea area." See App. I-25. Sales was then quoted as saying:

> "Sales said that if news reports from Scotland prove to be true, then 'in retrospect the Bar's settlement with Musslewhite was too lenient.' Sales said he has ordered Peterson and first assistant general counsel Steven Smoot to 'marshal all the evidence we can' for the Sept. 19 hearing. If the evidence shows Musslewhite violated the terms of his suspension and probation', Sales said, 'you can bet your sweet bippy the Bar will move to ask for punishment stronger than the Bar's settlement agreement'."

Hampton, the custodian, though having no statutory power to do so, became a self-annointed inquisitor, announced he was launching his own "investigation" and made these strange comments:

> "I can't figure out what he (Musslewhite) is doing', Hampton said Sunday. 'He cannot accept new cases, period. Even if he is meeting with solicitors, he can't do that under the order.. Reports of Musslewhite's actions are disturbing', Hampton said."

See App. I-22. Hampton's construction of the Agreed Judgement is shockingly inaccurate.

> ... News of the *press conference* (in Aberdeen) reached the U.S., *causing bar officials to launch their investigation.*"

See App. I-27; *emphasis ours.*

Obviously because the Petitioner had had the audacity to exercise his free speech rights in the two press conferences involving the Hartman Agent Orange case and the Piper Alpha matter, the Respondent filed a petition to revoke Petitioner's probation on September 13, 1988; Petitioner received notice of same on Sept 14, 1988; and Judge Casseb unbelievably set the trial on the merits of the petition for Sept 19, 1988. See App. T-1, T-2 and T-3.

The petition asserted two essential grounds for revocation: (1) that Petitioner violated the Referral Clause by accepting the Hartman Agent Orange case and (2) Petitioner violated the advertising rule of the Texas disciplinary rules (DR 2-101) by issuing a press release at the Piper Alpha press conference, by an advertisement run by Mr. Newman (over Petitioner's objection) and by a letter sent by Newman (again over Peti-

tioner's objection).[13]

Petitioner immediately filed a motion for continuance, pleading with Judge Casseb to postpone the trial so that Petitioner could have time to secure counsel, conduct discovery as the Agreed Judgment expressly gave him the right to do, prepare for trial and have the due process to which he was entitled. See App. U. But Judge Casseb callously overruled the motion and commenced trial on the merits of the petition to revoke *only* six days after service of the petition.

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13. The *only* three communications relied upon by the State Bar were attached to the petition to revoke as exhibits 1, 2 and 3. (See App. T). Exhibit 1 is a press release. It contains the following statement: "I would stress that my team *will not accept any cases except through Scottish or U.K.-based solicitors.*" Exhibit 2 is an advertisement run by another lawyer, Kelly Newman, not Petitioner. In any event, it states: "We understand that the Scottish Law Society has warned against directly employing U.S. attorneys and our team agrees with those suggestions. *It is our policy not to take any cases except through Scottish or U.K. solicitors.*" Exhibit 3 is a letter to victims, also sent by Kelly Newman, not Petitioner. It states: *"We will not accept any cases except through your own solicitor or lawyer.* The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so that we can discuss the suit ... with him."

Petitioner also filed a plea in abatement, asking Judge Casseb to abate the proceedings until the Piper Alpha allegations could be processed through the grievance committee, with subsequent right of trial by jury, all as required by Secs. 10-23 of Art. 10 of the State Bar Rules. See App. V. Again, Judge Casseb summarily rejected such plea. Thus, the State Bar had what it wanted: a swift trial *without* a jury, before a judge extremely hostile to Petitioner, one who would give them the kangaroo court they so badly wanted, and the Constitution of the United States be damned.[14]

Judge Casseb did indeed do exactly what the State Bar wanted him to do. Even though the Referral Clause clearly had not been violated and the communications complained-of in connection with the Piper Alpha matter were clearly protected by the First Amendment, he revoked probation and suspended Petitioner for the maximum he could under the Agreed Judgment, for three years. See App. A.

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14. The record speaks for itself. It is no exaggeration to characterize Judge Casseb as

Petitioner immediately filed a request for supersedeas of Judge Casseb's harsh judgment but of course Judge Casseb summarily, and without conducting an evidentiary or formal hearing, denied that request, as with all others ever made by Petitioner. See App. W (Rule 47 motion) and App. B (order overruling same). The primary basis of the Rule 47 Motion was that Texas' rule providing for blanket denial of supersedeas where an attorney has been suspended by the trial court (Sec. 24 of Art. 10 of the State Bar Rules) violates the due process and equal protection clause of the Fifth and Fourteenth Amendments and also perhaps violates the Eighth Amendment.

Petitioner duly perfected his appeal on the merits of the revocation trial to the Fourteenth court of appeals of Texas, where the appeal on the merits is presently pending. See excerpts from Petitioner's brief in the state court of appeals, App. EE.

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hostile and the revocation proceedings as a "kangaroo court". See *Ciechon v. City of Chicago*, 686 F.2d 511, 521, 522 (7 Cir 1982). If his actions during the underlying proceeding were merely harsh, his actions during the revocation trial were clearly brutal.

Because Petitioner is suspended pending the outcome of that appeal, Petitioner twice requested the state court of appeals to expedite the handling and disposition of the appeal but, for reasons not explained, the court of appeals refused to expedite, despite knowing that Petitioner is unjustly suspended during the appeal process. See App. X and Y.

Meanwhile, Petitioner pursued the only remedy provided by Texas law in order to appeal from Judge Casseb's erroneous denial of Petitioner's Rule 47 motion, namely a direct motion to the state court of appeals pursuant to Rule 49(b) of the Texas Rules of Appellate Procedure. See App. Y. This motion was also denied by the state court of appeals, again without any explanation. See App. F.

Petitioner thence followed the next step available to him, and that was filing a petition for writ of mandamus in the state supreme court, with a companion motion that the petition be expedited. See App. Z.[15]

15. Rule 49 does not contain any express procedure to follow after refusal by the court of appeals of a Rule 49 motion. The trial

Inexplicably, the supreme court of Texas sat on the petition for nearly three months (though it normally acts on petitions for mandamus within a few days) and, again without any explanation, summarily denied the petition, all the while having the audacity to state it was "granting" Petitioner's motion to expedite. See App. G (Copy of order dated June 14, 1989).[16]

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court's denial of supersedeas does not constitute a final judgment on the merits which would entitle the parties to go up to the supreme court of Texas by way of application for writ of error pursuant to Rule 130, T.R.A.P. (applies only to review of "final judgments"). Therefore, the only remedy available to Petitioner, to get an immediate consideration of the question of the constitutionality of Sec. 24 of Art. 10 of the State Bar Rules, was to petition for mandamus pursuant to Rule 121, T.R.A.P., which is what Petitioner did.

16. The reason the unusual delay by the supreme court of Texas was severely damaging to Petitioner is that, on May 2, 1989, 90-days of suspension had gone by. Petitioner is in the process, through direct attack in the state court (by way of bill of review) and through an action under the Civil Rights Act, of attempting to set aside the Agreed Judgment, which imposed the 90-day suspension in the first place. But, conceding *arguendo* the outstanding effect of the Agreed Judgment, it might be possible for Respondent to argue that Petitioner would not suffer any irreparable harm, by being suspended pending appeal, *until* the 90-days provided for in the Agreed Judgment had gone by. But, even conceding, again *arguendo*, the viability of

It is from the order of the supreme court of Texas, denying the Petitioner's petition for writ of mandamus with regard to the unconstitutionality of Sec. 24, Art. 10 of the State Bar Rules, as written and/or as applied in this case, that Petitioner is perfecting this petition for writ of certiorari.[17]

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that argument, there can be *no* doubt that Petitioner has been suffering irreparable harm since May 2, 1989, and it is extremely disturbing to Petitioner that neither the state court of appeals, which will not expedite the appeal on the merits, nor the state supreme court, which did not expedite the petition for mandamus, has shown any equitable concern about the irreparable harm Petitioner is suffering.

17. In the initial stages of the appeal from the revocation judgment, Petitioner sought a mandamus concerning the supersedeas question from the state court of appeals, thence the state supreme court, and thence a One-Justice Stay, pursuant to 28 U.S.C. 2101(f), from Fifth Circuit Justice Byron White. All these were denied, see App. C, D and E, apparently because Petitioner had not yet, when all those petitions were filed, exhausted his remedy in the state court of appeals under Rule 49(b), T.R.A.P. Petitioner then perceived that such petitions were premature, as made clear by this Court in ***Pennzoil v Texaco*** 95 LEd2d 1 (1988)(holding that, because the state court appellant had not exhausted all its remedies in the state court, the relief it sought with regard to supersedeas pending an appeal on the merits, would be denied. 95 L.Ed.2d at 16-18). *It is now undeniably clear that Petitioner has completely exhausted every possible remedy and that this Petition is both properly filed within the meaning of Pennzoil v Texaco and timely filed.*

In connection with the supersedeas issue, it should be noted that, though challenged by Petitioner both before and after judgment (by way of petition for injunction *before* and the Rule 47 Motion *after*), Respondent offered no evidence or proof, either before or after judgment, which would show or tend to show that Petitioner is an "immediate and substantial threat of irreparable harm" to his clients or the public, so as to justify interim suspension under Sec. 22 of Art. 10 of the State Bar Rules. See App. R. The procedure outlined in Sect. 22 was available to the Respondent to establish a possibly reasonable police power basis for taking Petitioner's valuable property right - pending appeal. Not only did Respondent not make any effort to offer any evidence to satisfy Sec. 22 for the obvious reason none existed but Judge Casseb implicitly found that Petitioner was *not* a threat to his clients and that no state or police power reason existed for depriving Petitioner of his license pending appeal, because Judge Casseb deferred the effective date of Petitioner's suspension so

that Petitioner could take care of important cases (such as the Reese case). See App. A, the judgment of suspension; App. AA-1, excerpts from the official record in the trial court; App AA-2, Petitioner's motion to defer suspension, which was granted in part; and App. AA-3, excerpts from Respondent's brief in the state court of appeals demonstrating that it has never contended that Petitioner constituted a threat of "irreparable harm" to his clients or to the public. Moreover, it was undisputed that neither the allegations in the underlying proceedings nor the allegations in the revocation proceedings involved moral turpitude or any ground which would justify interim suspension under Sec. 26 of Art. 10 of the Texas Bar Rules.

One more matter deserves mention before passing on to the "Reasons for Granting the Writ". We have mentioned above how the so-called solicitation allegations in the underlying proceedings were shown to be frivolous by the Respondent's refusal to go forward on those allegations when the underlying cases

were set for trial and by the failure of the custodian to find a single case that Petitioner had improperly solicited. If there could still be any doubt that the underlying suit was unjustly filed, that doubt must dissipate in the face of what occurred in July of this year. The General Counsel did indeed carry out his resolve to make O'Quinn a "sacred cow" and settled with him, despite allegations much more serious than those asserted against Petitioner, for a reprimand, a $38,000 fine and 100 hours of community service. See App. I-29 and 30. What was very revealing, Mr. Alexander correctly referred to the settlement as a "wrist-slap", App. I-29, and one of the members of the grievance committee stated that the General Counsel reported to them that he had to settle with O'Quinn, after all these years, because the solicitation case probably could not be won. See App. I-30. Again we note that the solicitation charges against O'Quinn were the same charges made against Petitioner, except that O'Quinn's were more serious. Compare App. J to App. K. Schwartz was also given a wrist-

slap. See App. I-31.

Probably the darkest side of this entire episode is a factor that has now become disgracefully obvious: money made the difference. As *The Texas Lawyer* article disclosed, App. I-30, O'Quinn spent "about $3 million on the case" and thus apparently intimidated the General Counsel, who said:

> "I'll do what you all say but this guy (O'Quinn) can outspend the Bar and I'm facing [five] highpowered lawyers ... (t)he bottom line is that it (giving O'Quinn a wrist-slap) came down to economics."

App. I-30, p. 17.[18]

The so-called crusade against "unsavory solicitation" was thus finally stripped of its pretense and shown for what it always was - a charade; a hypocritical soul-cleansing; a political maneuver by the insurance

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18. What all this revealed is that one of the primary reasons Benton Musslewhite was selected as the scapegoat was that he did not have the money to hire "five high-powered lawyers". Ironically, this Court commented upon this very factor as recently as about two months ago in ***Texas v Johnson*** 57 U.S.L.W. 4770 (1989). The Court stated that, in regulating speech and expression in the face of the First Amendment, the state "must demonstrate its commitment to advancing this interest by applying its prohibition ***evenhandedly***, to the small time disseminator as

company-petrochemical-manufacturing interests to help them with "tort reform"; a soap-box for the envious, the self-righteous, those with a vigilante complex, willing to crucify others for the sake of their own misguided goals; and, most of all, a vendetta against Benton Musslewhite - not really because they deemed him to be unethical - but because he was a high-profile, unorthodox, controversial, crusading, political liberal who used a press conference-television methodology that offended them and their insurance company clients and because he was financially strapped and thus an easier target. The whole despicable circus made a mockery of justice and our Constitution and hurt a lot of people.[19]

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well as the media giant." 57 USLW at 4820. By the same token, the State Bar of Texas should prosecute the members of its Bar evenhandedly, and a member who has been accused of far worse deeds than another should not be given a "wrist-slap" because he is rich, while the other is given maximum punishment because he is relatively poor.

19. Gloria Chaplin testified in the state trial court as to how she wanted Petitioner to try the Liberty Waste dumpsite case, set for May of 1989, but that it had to be tried by other lawyers because of Petitioner's improvident suspension. While the other lawyers did a good job, Ms. Chaplin felt that Petitioner would have gotten a better result and

Finally, the "scapegoat-sacred cow" approach to "lawyer discipline" dominated the revocation proceedings just as it had the underlying proceedings. Kelly Newman, though he was more heavily involved than Petitioner in the three communications made the basis of the Piper Alpha allegations,[20] was not prosecuted at all, while the State Bar sought to suspend Petitioner for the maximum term of three years. See App. R, Petitioner's Affidavit.

Despite the fact the Petitioner raised in the trial court the violation of his equal

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that the State Bar wronged her by improperly depriving her of the counsel of her choice. She filed a grievance against grievance committee 4-C because they forced her to come before them without Petitioner, her then attorney, being present, but with a partner of Baker & Botts (the firm that represented Exxon Corp in the *Liberty Waste* case) present as a member of the grievance committee. Ms. Chaplin stated that the grievance committee attorneys attempted to denigrate Petitioner and tried to get her to discuss the merits of the *Liberty Waste* case. Ms. Chaplin filed her grievance in 1986 and, of course, she has never heard a word about it. See App. BB, the affidavit of Ms. Chaplin filed in the state court of appeals, and excerpts from her testimony in the state court.

20. Petitioner and Newman were equally involved in the press release prepared for the press conference. Newman was much more

protection rights, the Respondent made no effort to offer any proof which would satisfy its burden to establish a rational state basis for prosecuting Petitioner and not Newman and for the disparate, discriminatory treatment between Petitioner and O'Quinn.[21]

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heavily involved in running the ad and sending the letter. Indeed, he prepared and ran the ad and sent the letter (neither of which mentioned Petitioner by name) over Petitioner's objections. See App. CC, excerpts of testimony of Petitioner and Newman in the trial court.

21. There were a number of other examples of selective prosecution and enforcement. For example, James McNeilly, the alleged star witness of the Respondent's solicitation case (a man whom, as we stated above, Petitioner did not know and had never met), according to Mr. Alexander had been a "runner" for "eight Houston lawyers" *other* than Mr. O'Quinn. See App. I-9. The initial "investigation" was of 17 Houston lawyers. See I-3 and 4. Neither the State Bar nor Mr. Alexander prosecuted any of these *other* lawyers. See App. R. Mr. O'Quinn was also involved in the Piper Alpha episode (he was on the "team" referred to by Newman) and he, also, was not prosecuted about the Piper Alpha matter. In addition, according to Mr Harrington of the Texas Civil Liberties Union, discrimination against the solo practitioner and in favor of the large corporate firms is pervasive with regard to the Texas disciplinary system. See App. DD. Even the Texas supreme court has raised the unequal protection flag - particularly with regard to "solicitation" prosecutions - by suggesting that large firms have virtual immunity while the solo plaintiffs' attorneys are selectively prosecuted. See ***O'Quinn v. State Bar of Texas***, 763 S.W.2d 397,404 (Tex. 1988).

II.

REASONS FOR GRANTING WRIT OF CERTIORARI

A. Sect. 24, Art. 10 of the Texas State Bar Rules Is Unconstitutional As Written And/ Or As Applied In this Case.

Sec. 24, Art. 10 of the Texas State Bar Rules provides:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Adopted Feb. 29, 1984, eff. March 1, 1984.)

Mr. Smoot, Assistant General Counsel of the State Bar, argued that Sec. 22 constitutes a ***blanket*** prohibition against supersedeas pending appeal of a trial court's judgment of suspension. According to the State Bar, Sec. 22 commands the trial court judge to deny supersedeas regardless of the circumstances and leaves absolutely no discretion in the trial court judge to grant supersedeas. See also App AA-3. Judge Casseb, as did the Texas court of appeals and the Texas supreme court, accepted Respondent's

construction of Sec. 24.

Thus, if the suspension is only for thirty days, the lawyer suspended will have to "serve his time" before he can possibly complete his appeal and, therefore, his right to appeal will have been effectively nullified by Sec. 24, even though he may eventually win the appeal. This apparently happened in ***Daves v. State Bar of Texas***, 691 S.W.2d 784 (Tex.App.- Amarillo 1985).

In Petitioner's case, he is facing this same oppressive and hopeless mootness, at least in substantial part. Petitioner perfected his appeal in Dec. 1988 and here it is ten months later, and the intermediate court of appeals has not even set the appeal on the merits for oral argument, in the process having twice refused Petitioner's request for expeditious and accelerated treatment of his appeal. These refusals to expedite have taken place even though the state court of appeals knows that Petitioner is suspended pending appeal and suffering devastating, day-to-day, irreparable harm. Based upon reasonable estimates, it will be

another 16 to 24 months before the court of appeals finally sets the case for oral argument, hears the arguments and then publishes its opinion and the Petitioner, if he loses in the court of appeals, applies for writ of error in the supreme court, writ is granted, arguments ensue and the supreme court finally issues its opinion. By that time, Petitioner's appeal on the merits will obviously have become virtually moot in that Petitioner will have been suspended for almost the full term of three years. And then when Petitioner wins his appeal on the merits, how does he get back those almost three years he will have been unjustly suspended? That time is gone forever. Considering Petitioner's age, 58, and such a long hiatus, it is doubtful that he will be able to restart his practice or afford the building time required to regenerate his practice. The General Counsel and the State Bar establishment will have then unconstitutionally accomplished what they have tried to do for twelve years - put Petitioner completely out of the legal business.

And there will be no legal remedy for all this. If Petitioner sues the State Bar, Mr. Peterson, Sales, et al for damages they undoubtedly will cloak themselves with immunity and/or qualified immunity and Petitioner's burden will indeed be heavy, possibly insurmountable, to overcome such defense. How can a judicial system with such a great constitutional tradition let this kind of thing happen? It is happening in this case because - even though Petitioner had been suspended on hypertechnical grounds, such as violations of the advertising rules; had not been shown to be guilty of any disciplinary rule involving moral turpitude; had not been shown to constitute a threat to his clients or the public; and his appeal on the merits of the judgment of suspension clearly presented "fair grounds for litigation" - ***the Texas courts, in view of the terms of Sec. 24, still did not have the discretion to give the suspended Petitioner supersedeas pending an appeal he is going to win.***

It is clear, therefore, that Section 24 is unconstitutional and violates the Peti-

tioner's right to an effective appeal and thus is in conflict with the Fourteenth Amendment to the Constitution of the United States. In addition, the refusal to allow supersedeas when the state has not shown any permissible police-power reason for not allowing supersedeas, constitutes a taking of Petitioner's property, namely his right and license to practice law, without due process of law, in violation of the Fifth and Fourteenth Amendments. Such action may also violate the Eighth Amendment concerning excessive fines and bail.

The discussion of the unconstitutionality of the Texas supersedeas statutes in *Texaco v. Pennzoil Co.*, 784 F.2d 1133 (2 Cir. 1986), rev'd on other grounds, *Pennzoil v. Texaco*, 95 L.Ed.2d 1 (1987), is relevant to this case. The court of appeals stated:

> "The Texas Constitution grants a right of appeal to all civil and criminal litigants. *Nelson v. Krusen*, 677 S.W.2d 918, 921 (Tex. 1984); *Airco Inc. v. Tijerina*, 603 S.W.2d 785 (Tex. 1980); *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965); *Dillingham v. Putnam*, 109 Tex. 1, 14 S.W. 303, 304-305 (Tex. 1890); *Moore v. Wutke*, 145 S.W.2d 224, 226 (Tex.App. 1940). ***Federal due process forbids the state from arbitrarily excluding certain parties from***

that right. Evitts v. Lucey, 105 S.Ct. 830, 840, 83 L.Ed.2d 821 (1985); *Griffin v. Illinois*, 351 U.S. 12, 17-20, 76 S.Ct. 585, 589-591, 100 L.Ed. 891 (1956). ***Furthermore, due process requires that, once the state has created a right of appeal, it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal'.*** *Evitts, supra. See also, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 n.5, 102 S.Ct. 1148, 1154-1155 n.5, 71 L.Ed.2d 265 (1982). ***A state would deny a defendant such a fair opportunity if it reduced the appeal to a meaningless ritual*** by denying him the means effectively to press his appellate arguments. *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 817 (1963). It is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had, by application of a bonding law, been robbed of any effectiveness. Cf. *National Socialist Party v. Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96 (1977); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 1324-1325, 96 S.Ct. 237, 239-240, 46 L.Ed.2d 199 (1975, Blackmun, J., in chambers); *Times Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305, 95 S.Ct. 1, 3, 42 L.Ed.2d 17 (1974)(Powell, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203, 92 S.Ct. 752, 753, 30 L.Ed2d 769 (1972)(Powell, J, in chambers).

Thus, ***an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount is posted can in some circumstances be irrational, unnecessary and self-defeating, amounting to a confiscation of the judgment debtor's property without due process.*** A serious question presenting fair grounds for litigation is therefore raised by Texaco's claim the enforcement of Texas' lien and bond requirements would reduce its appeal to a meaningless ritual. Since Texaco would be bankrupt or in liquidation by the

> time its appeals were decided the hardship to it would be immeasurable, irrevocable and irremedial by reversal of the judgment on the merits." 784 F.2d at 1154.

(Emphasis ours).[21A]

As we pointed out above, the irreparable harm that is occurring to the Petitioner in this case is certainly on a day-by-day basis. See discussion of "day-by-day" harm in *Nebraska Press Assn. v. Stuart*, 423 U.S. 1327 (1975)(per Blackmun, J., in chambers). Moreover, it is quite clear that the Petitioner has no adequate remedy at law unless this Court decides the supersedeas issue now, because once the appellate process is completed on the merits of the suspension judgment, regardless whether Petitioner wins or loses, the supersedeas issue will have become moot. See ***Heard v. The State Bar of Texas***, 603 S.W.2d 829 (Tex. 1980).

21A. This Court, though reversing the court of appeals, did not reject the above statement of the law. The Court reversed on the ground that the district court erred in not abstaining pursuant to the *Younger* doctrine. See *Younger v. Harris*, 401 U. S. 37 (1971) (because Texaco had not exhausted all remedies in the state court concerning supersedeas or other similar relief). This Court noted that it was expressing no opinion on the "federal constitutional claim". 95 L.Ed.2d at 16, 18.

The key to the unconstitutionality of Sec. 24 is its "inflexibility."[22] Its rigid preclusion of supersedeas is not tied to constitutionally acceptable criteria. Judge Casseb accepted Mr. Smoot's argument that the statute constitutes a blanket ban on supersedeas once an attorney has been suspended at the trial court level. Judge Casseb rejected the argument of Petitioner that Sec. 22 provided the only constitutionally acceptable criteria for dealing with a request for supersedeas following a judgment of suspension.

Texas does provide in Sections 22 (providing for interim suspension where attorney shown to constitute an immediate threat of harm to clients or the public) and 26 (providing for interim suspension where attorney shown to have been convicted of a

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22. Not only did the court of appeals in *Texaco v Pennzoil* discuss how an "inflexible" prohibition against supersedeas is usually constitutionally fatal but the district court, 626 F.Supp. 250 (S.D.N.Y. 1986), also noted that where there is "no discretion" in the state court to grant supersedeas, such anti-supersedeas statutes (Sec 24 in this case) should probably be condemned as unconstitutional. 626 F.Supp. at 256, 257.

crime of moral turpitude) possible constitutional bases for suspending an attorney before his disciplinary case has become final after all appeals have been exhausted. It is undisputed that the Respondent did not comply, and made no attempt to comply, with either one of these sections.

Absent compliance with either Section 26 or 22, there simply is no police power justification for taking the Petitioner's license pending his appeal on the merits. ***People v. Treadmill***, 5 P. 686 (Calif. 1885); ***In re Ricardi***, 189 P. 694 (Calif. 1920); ***State ex rel Larew v. Sale***, 87 S.W. 967 (Miss. 1905); ***Louisiana State Bar Assn. v. Ehmig***, 277 So.2d 137 (La. 1973); ***In re Ming***, 469 F.2d 1352 (7 Cir. 1972); ***Willner v. Committee on Character and Fitness***, 373 U.S. 96, 10 L.Ed.2d 224 (1963); ***Schware v. Bd. of Bar Examiners***, 353 U.S. 232, 1 L.Ed.2d 796 (1957); ***United States v. Friedland***, 502 F.Supp. 611 (D.C., N.J. 1980).

Indeed, in a case that is not precisely analogous, but sheds some light upon the question, ***In re Ming, supra***, the court struck

down as unconstitutional the application of a state bar rule to a particular attorney which provided that an attorney, who has been convicted of a crime, could be suspended pending the appeal from the criminal conviction. The court stated:

> All we say is that if the conviction itself is to be used to show that the appellant actually committed the underlying acts which are of such a nature as to form the basis for disbarment or suspension, *that conviction must have reached finality, at least to the extent of exhaustion of direct appeals.* Since appellant has the possibility of filing for a writ of certiorari in the United States Supreme Court, we do not think that the affirmance of his criminal conviction by this court moots this point.

469 F.2d at 1354. A contrary view is taken in ***United States v. Friedland***, ***supra***, but only because the ***Friedland*** case involved a *felony conviction involving moral turpitude*, whereas the ***Ming*** case involved a misdemeanor. The point in ***Ming***, with which ***Friedland*** did not disagree, is that there is no reasonable basis for suspending an attorney pending an appeal from his criminal conviction where it is not clear that the public might suffer some harm during the period of the appeal.

US v. ***Friedland*** makes this point extremely

clear. Citing the case of ***State v. Yormark***, 117 N.J.Super. 315, 284 A.2d 549 (App.Div. 1971), cert den. 60 N.J. 138, 286 A.2d 511, cert den sub nom ***Mulvaney v. New Jersey***, 407 U.S. 925 (1972), the ***Friedland*** Court noted that in ***Yormark*** the attorney who had been convicted of a crime was "permitted to practice following his conviction until exhaustion of the New Jersey appellate process." *Id.* at 618. During the time that the appeal was pending the defendant attorney "disappeared with a large amount of clients' funds." The Court in ***Friedland*** noted that, after such experience, the State Bar of New Jersey took the following action:

> Since the time of the Yormark proceedings the New Jersey Supreme Court had promulgated an extensive revision of that state's attorney disciplinary procedures, N.J.R. 1:20 et seq., *and provision is (now) made for prompt suspension of an attorney where necessary to protect the interests of an attorney, client or the public*. N.J.R. 1:20-3(i).

Id. 502 F.2d at 518, n.12; emphasis ours. As the Court in ***Friedland*** made clear, the above referred-to amendment was designed to provide the means - *and the only means* - whereby the New Jersey Bar could properly and reasonably,

in the face of the Constitution of the United States, *suspend an attorney pending an appeal from a suspension order.*

It goes without saying that N.J.R. 1:20-3(i) of the New Jersey State Bar Rules is almost precisely identical to Section 22 of Article 10 of the Texas State Bar Rules. What cannot be denied, is that what the court in ***Friedland*** is saying is that New Jersey has recognized that, in order to constitutionally suspend an attorney pending appeal, a State Bar must *first* show that an immediate suspension is necessary because such attorney poses a threat to his clients or to the public. To be precise, unless the State Bar of Texas takes action to have an attorney declared such a threat pursuant to Sec. 22 (which is similar to N.J.R. 1:20-3(i)), the State Bar cannot constitutionally enforce suspension pending an appeal.

Putting the same proposition another way, the right to practice law has always been considered by this Court and the Texas courts as a valuable property right. See *In re Ruffalo*, 390 U.S. 544 (1986) and *Sizemore v.*

State Board of Dental Examiners, 747 S.W.2d 389 (Tex.App.-Dallas en banc, 1987), rev'd on other grounds, 759 S.W.2d 114 (Tex. 1988).[22A]

As Professor Antineau points out in his Treatise, *Modern Constitutional Law, The Individual and Government*, the "federal government, under the Fifth Amendment, and the states, under the Fourteenth Amendment, can regulate the use of private property, whenever such regulation is reasonable, and *reasonably* related to the public health, safety, morality or general welfare. It is ... *unreasonable*, arbitrary or capricious interference with the use of property that is unconstitutional." Volume 2, Sec. 3:1 at p. 206; emphasis added.

As Justice Brennan stated in a separate opinion in *Zauderer v. Office of Disciplinary*

22A. The Court in *Sizemore* stated that the "right to practice a profession has been called a property right, but it is more. ... There is moreover a prestige of good name and should be a pride attached to the practice of an honorable profession superior to any material possessions. To cancel a professional license is to take the entire capital stock of its possessor and leave him in most instances the equivalent of bankrupt. But it does more than this: it takes from him his professional standing and in a manner, whatever good name he has, which leaves him poor indeed. ..." 747 S.W.2d at 389.

Counsel of the Supreme Court of Ohio, 471 U.S. 616, 85 L.Ed.2d 652 (1985):

> 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, due process guarantees must scrupulously be observed. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). See also, *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972)(same with respect to any charge. ... that might seriously damage [a person's] standing and associations in his community). *Paul v. Davis*, 424 U.S. 693, 722-723, 74 L.Ed.2d 405, 96 S.Ct. 1155 (1976)(Brennan, J., dissenting)('the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal liberty').

85 L.Ed.2d at p. 684.

Thus, there can be no doubt that a statute such as Sec. 24, particularly as applied in this case, constitutes a taking of Petitioner's valuable property right without due process of law and it is punitive and harsh, so harsh that it may exceed the constitutional threshhold under the Eighth Amendment. See *Solemn v. Helm*, 77 L.Ed.2d 637 (1983).

Finally, it appears that even a convicted criminal in the State of Texas has more rights than an attorney, if the criminal

defendant has not been sentenced to more than fifteen years in the penitentiary. Such convicted defendants have the constitutional right to obtain a supersedeas bond pending appeal while the Petitioner does not. See Article 44.04 of the Texas Code of Criminal Procedure. Certainly, Equal Protection would require that an attorney who has not been convicted of any crime of moral turpitude; who has not been shown to be an immediate threat of harm to his clients or to the public; and who has shown probable success of his appeal on the merits, should be entitled to the same rights as a convicted criminal of having supersedeas while he presses his case on appeal. See *Lindsey v. Normal*, 405 U.S. 56, 77 (1972) (opportunity for appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause").

We must also note that the manner in which Judge Casseb summarily denied supersedeas, without a reasonable hearing with reasonable notice, also violated Petitioner's constitu-

tional rights to due process. See ***Fuentes v. Shevin***, 407 U.S. 67, 32 L.Ed.2d 556 (1972) (holding that the right to have a hearing *before* property of any type is taken from the possessor, is a right guaranteed under the Due Process Clause) and ***Attorney Grievance Commission of Maryland v. Reamer***, 379 A.2d 171 (Md.App. 1977)(holding that a state bar rule, involving interim suspension requires that the attorney in question, *before* he can be deprived of his right to practice law, must be given notice and opportunity to show cause why his conviction did not involve moral turpitude).

The "hearing" that was constitutionally required was an evidentiary one, where the State Bar would assume its burden of proving some justifiable police-power reason for taking Petitioner's license pending appeal. This Court stated in ***Zauderer*** that where a state seeks to restrict the exercise of rights under the Bill of Rights it has the burden of proving and mustering "record evidence" showing that such restriction is a reasonable exercise of the state's police

power. 85 L.Ed.2d at 699, 671. See also, ***In the Matter of R.M.J.***, 455 U.S. 919, 202, 85 L.Ed.2d 674, 678 (1982), also 455 U.S. 200 n.11 (state must justify restriction in light of "experience"); ***Central Anderson Gas v. Public Service Commn***, 447 US 557, 570 (1980); ***Bates v. State Bar of Arizona***, 433 U.S. 350, 381 (1977); ***Linmark Associates, Inc. v. Township of Willingboro***, 431 U.S. 85, 52 L.Ed.2d 155 (1977)("The record here demonstrates that respondents failed to establish that there restriction is needed"); ***Virginia Pharmacy Bd v. Virginia Consumers Council***, 425 U.S. 748, 769 (1976)(Commonwealth's justifications failed on "close inspection"). See also ***Metromedia, Inc. v. San Diego***, 453 U.S. 490, 528, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981)(Brennan, J., concurring in judgment).

The truth is, the very basis of Sec. 24's unconstitutionality-its automatic, inflexible denial of suspension - precludes such a hearing because a trial judge has nothing to hear. And that fact in itself elucidates further why Sec. 24 is so fundamentally unconstitutional.

B. The Harmful Consequences Of Suspending Petitioner Pending Appeal Are Exacerbated By The Fact That Petitioner Is Going To Win The Appeal On The Merits (Or At The Very Least There Is "Fair Grounds For Litigation")

There really can be no serious doubt but that Petitioner is going to win the revocation judgment appeal. At the very least "fair grounds for litigation" exist. Since the object of this Petition is not the merits of the revocation judgment appeal but the unconstitutionality of Sec. 24 and the failure to grant supersedeas, we will only briefly discuss the constitutional questions involved in the revocation judgment appeal.[23]

1. Giving Only Five Days Notice of the Revocation Petition and Trial on the Petition Constitutes Gross Abuse of Due Process Rights.

This Court, as far back as the turn of the century, stated:

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a

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23. We are attaching excerpts from the Original Brief and the Supplemental Brief filed in the state court of appeals as App. EE. These Briefs contain specific citations to the official record presently situated in the state court of appeals.

> singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701-712, 28 L.Ed. 569-573, 4 S.Ct. 663 .... An ordinary summons, however, to answer the suit of a private individual, contemplates that the party served may have other business of equal or greater importance engaging his attention, or may require time for the retainer of counsel and the preparation of his defense ... and therefore, in general, *several days should intervene between the time of summons and hearing.* In the superior courts, in general, *at least eight days* notice of inquiry and of trial are essential for the preparation of the defense."

Roller v. Holly, 176 U.S. 398, at 409, 410 (1900); emphasis ours. This Court thus indicated that eight days notice would constitute the bare minimum for due process and, depending on the circumstances, a longer time period could very well be necessary. Because the five days notice given in *Roller v. Holly* did not provide the defendant with due process, the Court ordered "that the judgment obtained upon such (5 days) notice was not binding upon the defendant Roller..."

Id. at 526.[23A]

A more devastating combination of procedural Due Process violations and deprivations could not be imagined than those that occurred in this case: a grossly inadequate notice in terms of time;[23B] no content notice of the provisions of the Disciplinary Rules upon which the Respondent intended to rely; Petitioner forced to commence the trial without counsel; and the failure to allow meaningful discovery prior to commencing and

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23A. See also, ***Armstrong v. Manzo***, 280 U.S. 545, 14 L.Ed.2d 62 (1965) (holding that where a party has been deprived of procedural due process, all proceedings and judgments rendered following such deprivation must be "set aside" and the trial court must "consider the case anew," 14 L.Ed.2d at 66, 67). And see ***Mullane v. Central Hanover Bank***, 339 U.S. 306, 94 L.Ed. 865 (1949); ***Goldberg v. Kelly***, 397 U.S. 254, 25 L.Ed.2d 287 (1970); ***Atkins v. Parker***, 472 US 115, 86 L.Ed.2d 81 (1985); ***Zauderer***, 85 L.Ed.2d at 685 (adequate notice not only requires a reasonable notice in terms of time but also in terms of content; "under the Due Process Clause, 'reasonable notice' must include disclosure of 'the *specific* issues [the party] must meet'", citing *In re Gault*, 387 U.S. 1, 18 L.Ed.2d 527 (1967)).

23B. Indeed, the failure to give Petitioner 20 days notice of the revocation petition and 10 days notice of the trial thereon blatantly violated Rules 49 and 245, Tex.R.C.P., respectively.

concluding the trial.

2. Failure to Process Piper Alpha Allegations Through the Grievance Committee and Allow Trial by Jury Thereon *Before* Utilizing Revocation Procedures, Violates Due Process Rights of Petitioner.

Sects. 10-23 of Art. 10 of the State Bar Rules establishes the procedural rights of all Texas lawyers charged with any alleged violation of the Texas Disciplinary Rules. Sec. 16(I) specifically provides that such lawyers will have the right of trial by jury. And see Sect. 81.077(a) of the Texas Govt. Code.

This Court has consistently held that, while a trial by jury in civil cases in the state courts may not be constitutionally guaranteed, once that right or any other procedural right (such as the hearing before the grievance committee) is given to a class (such as Texas lawyers), the doctrine enumerated in the landmark case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265 (1982), comes into play (holding that once a state has made access to an administrative and court scheme an entitlement or a necessity, the state may not deprive anyone

of the benefits of that scheme without violating the Due Process and Equal Protection Clause. 71 L.Ed.2d at 723-725.). See also, *Evitts v. Lucey*, 105 S.Ct. 830 (1985) and *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891 (1956). Therefore, the court below violated Petitioner's constitutional rights when it refused to refer the Piper Alpha allegations to the grievance committee for processing there, thence with the right of trial by jury should Petitioner be dissatisfied with the determination of the grievance committee.[23C]

23C. The Respondent has taken the position that the Petitioner waived his right to trial by jury on the Piper Alpha matter because the Agreed Judgment stated that the revocation trial could be conducted "without the aid of a jury." However, in Texas the right to trial by jury is constitutional, *White v. White*, 196 S.W.2d 508 (Tex. 1917), and a lawyer's right to trial by jury is thus protected by the U.S. Constitution under the *Logan* doctrine. Anticipatory waivers of such fundamental rights are generally not permitted. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Zeesell Realty Co. v. Cunningham*, 211 N.Y.S. 591, 592 (N.Y.Sup. 1925)(cannot anticipatorily waive right of trial by jury where "such an anticipatory provision is not one of the methods expressly defined by statute by which a right to a trial by jury may be waived"); and see *Frierson v. Realty Corp.*, 54 N.Y.S.2d 243 (City Ct, N.Y. 1945). There is no statute or rule in Texas expressly

3. By Prosecuting the Petitioner for Communications Directed Only To U.K. Solicitors and Lawyers, Respondent and Judge Casseb Clearly Violated Petitioner's First Amendment Rights.

The fatal black-hole in the Respondent's case was aptly articulated in ***Bates v. State Bar of Arizona***, 433 U.S. 350, 53 L.Ed.2d 810 (1977):

> "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. ... Thus, different degrees of regulation may be appropriate in different areas."

53 L.Ed.2d at 835 n.21; emphasis ours. See also, ***R.M.J.***, 71 L.Ed.2d at 73; and ***Spencer v The Honorable Justices of the Supreme Court of Pennsylvania***, 579 F.Supp 880, 892 (E.D.Pa.

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authorizing an anticipatory waiver of the right of trial by jury. Moreover, there are strong presumptions against anticipatory waivers of the right of jury trial. See ***Aetna Insur. Co. v. Kennedy***, 301 U.S. 389 (1936)(the "courts will indulge in every reasonable presumption against a waiver of the fundamental right of trial by jury") and ***Groeger v. Mifles Realty Corp.***, 182 N.Y.S.2d 731 (N.Y.Sup. 1959)(anticipatory waivers of the right of jury trial "are always strictly construed and are not to be lightly inferred or extended by implication"). Since the Agreed Judgment does not contain an express waiver of Sec. 10-23, including Sec. 16-I, the jury trial provision, it is obvious that the Agreed Judgment does not constitute an anticipatory waiver of that right.

1984). As observed by the court in *Spencer*, *as a matter of law "[l]awyers are capable of understanding, evaluating and distilling legal advertisements" and any attempted regulation of communications from one lawyer to another "is unnecessary to advance any state interest and therefore unconstitutional".* 579 F.Supp. at 892; emphasis ours.

Though challenged in the trial court repeatedly by Petitioner to prove that the members of the Law Society of Scotland were so "unsophisticated" that they could not make reasonable verification of the statements contained in the press release, letter and ad, Respondent of course made no effort to offer such proof and Judge Casseb of course made no finding to that effect.[24A]

24A. Moreover, *Zauderer* and *R.M.J.* leave no doubt but that the Respondent had the burden of surmounting all of the required hurdles in order to constitutionally justify interference with Petitioner's rights under the First Amendment. The Court in *Zauderer* stated that "[w]here a regulation is addressed to allegedly deceptive advertising, *the State must ... demonstrate* that the advertising either is inherently likely to deceive or *must muster record evidence* showing that a particular form or method of advertising has in fact been deceptive.'" 85 L.Ed.2d at 677; emphasis ours; also see *R.M.J.*, 455 U.S. at 202.

Therefore, without any question, DR 2-101 is unconstitutional as applied in this case.[25]

4. The Prosecution of Petitioner On the Basis of the Hartman Agent Orange Case Violates Petitioner's Constitutional Rights Under the Vagueness Clause.

Justice Brennan, in his concurring opinion in *Zauderer*, aptly describes the Vagueness Doctrine:

> "A regulation that 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L.Ed. 322, 46 S.Ct. 126 (1926). The Fourteenth Amendment's Due Process Clause 'insist[s] that

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25. It has been suggested that there are "less extensive" and more constitutional means (then as stated in DR 2-101) of dealing with communications at or near the scene of disasters, e.g. by setting down *clear* guidelines as to when such communications can be made by potential attorneys (plaintiffs or defendants attorneys) or claims adjusters (e.g., a waiting period except for dealing with emergency needs); how they can be made (permitting press conferences, letters, advertisements, etc., but *not* by direct contact with a victim by an attorney); and further providing no restrictions on content if the communications are, as in this case, directed to the personal lawyer of the victims (recommending, though not requiring, that all such communications be directed to the victim's personal attorney so that reasonable verification can be more easily made and the opportunities for fraud, overreaching and duress better avoided.)

> laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972). ...

As we noted above, the Referral Clause does not specify just *how* referrals are to be made. The Respondent, after-the-fact, took the position in its brief in the state court of appeals that Petitioner violated the Clause by accepting employment *before* referral and by agreeing to work on the case *after* referral.

To require referral by an attorney without being "employed" as an attorney, as suggested by Mr. Smoot and found by Judge Casseb, places the Referral Clause in direct and fatal conflict with DR 2-107 which states that, for a referral to be proper, the client must consent "to the *employment* of the other lawyer ...." (Emphasis ours).

And it was undisputed that Petitioner referred the Hartman case to Mr. Mansulla in accordance with custom and usage in Texas. See App. S. For all of the foregoing reasons, the Referral Clause surely violates the

Vagueness Doctrine, described above.[26]

5. There Can Be No Doubt That The Discriminatory Prosecution of Petitioner In This Case Violated the Petitioner's Constitutional Rights Under the Equal Protection Clause.

In 1985, this Court set the standard that must be followed under the Equal Protection Clause:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 227 (1885).

The Court later further articulated the test by stating that the application of a law or regulation to some but not to others similarly situated, "will survive equal protection (only) to the extent that they are

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26. The Referral Clause as construed by Judge Casseb also conflicts with Sec. 7 of Art. 10 of the State Bar Rules because it imposes a form of sanction which is not expressly authorized by the State Bar Rules. See *State Bar of Texas v. Edwards*, 646 S.W.2d 543 (Tex.App.-Houston [1st Dist] 1982), writ ref'd n.r.e.

substantially related to a legitimate state interest" and the state must show that there is a "rational basis" for the difference in application of such law or regulation. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L.Ed.2d 313, 321, 325 (1985).

Once apparent discrimination appears - such as where there are two or more persons similarly situated and only one is selected for prosecution - the burden shifts to the state to show that such decision was based upon an appropriate and compelling governmental interest, particularly where the prosecution involves constitutionally protected activity such as speech and expression. See *Cleburne v. Cleburne Living Center*, supra; *Ciechon v. City of Chicago*, 686 F.2d 511 (7 Cir. 1982); and *Olshock v. Village of Skokie*, 541 F.2d 1254 (7 Cir. 1976).[27]

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27. The *Ciechon* case bears a remarkable similarity to this one. There, a discharged paramedic with the Chicago Fire Department, Ciechon, brought a civil rights suit alleging that his discharge violated the Due Proces and Equal Protection Clauses of the Constitution. Ciechon and another paramedic, Ritt, handled an emergency call from a family

The analogy between Ciechon and Ritt in the *Ciechon* case and Newman and Musslewhite in this case, cannot be avoided. The involvement of Newman in the Piper Alpha communications in question was much more extensive than the involvement of Petitioner. Yet, though challenged to do so, Respondent made no effort to establish a legitimate governmental reason for prosecuting Petitioner and

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by the name of Ciebien. Mr. Ciebien died after the team left and the Ciebiens complained that the team had mishandled the situation. As a result, Ciechon was dismissed but Ritt was not. The court, revealing a remarkable application of its holding to this case, stated:

> *The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs.* Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, *were treated absolutely differently.* Ciechon was charged with failure to perform her duties and discharged; Ritt was never charged or disciplined in any fashion. Since the discrimination was intentional, the equal protection clause was violated. *United States v. Falk*, 479 F.2d 616, 619 (7 Cir. 1973)(en banc).

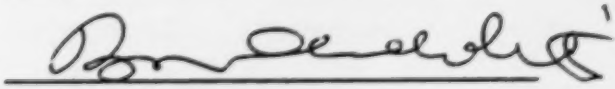
686 F.2d at 522, 523; emphasis ours.

not prosecuting Newman.

In sum, as we stated above, the probability of Petitioner's success in the appeal on the merits of this case is beyond question. At the very least, reasonable "grounds for litigation" are present with regard to such appeal.

WHEREFORE, PREMISES CONSIDERED, Petitoner prays that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,



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Esperson Bldg.
Houston, Texas 77002
(713) 222-2288

Supreme Court, U.S.
FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-555

*

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

* * *

Volume I

Benton Musslewhite
PRO SE
1535 Mellie Esperson Bldg.
815 Walker
Houston, Texas 77002
713/222-2288

APPENDICES TO PETITION
FOR WRIT OF CERTIORARI

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B. Order of State District Court Denying Rule 47 Motion, Requesting Supersedeas.

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EE.Excerpts From Briefs Filed By Musslewhite In State Court Of Appeals, Discussing Points Of Error, etc.

APPENDIX A

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL
	[]	DISTRICT

NO. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,G
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL
		DISTRICT

ORDER REVOKING PROBATION
AND IMPOSING SUSPENSION

On September 20, 1988, the Court called the Motion to Revoke Probation filed by the State Bar of Texas, for hearing. Petitioners in the above-styled, numbered, and consolidated disciplinary actions are the Grievance committees for

State Bar District Nos. 4-A and 4-C, State Bar of Texas. Respondent is Benton Musslewhite. The Court heard evidence on September 20, 1988, and on October 17 and 18, 1988.

The Court, after considering the evidence, arguments of counsel, and authorities, is of the opinion and rules that the Motion to Revoke Probation should be granted, that Respondent has committed professional misconduct and has violated the terms and conditions of the Court's Judgment signed on January 29, 1988, that Respondent's probation should be revoked, and that Respondent should be suspended from the practice of law for a period of three (3) years.

On November 7, 1988, the Court called the Motion to Set Hearing on Punishment; Expedite Hearing on Motion to Reconsider, Stay any Order of Suspension, If Any Pending, If Appeal is Necessary;

and or Reconsideration and Rehearing, and the Motion for Permanent and/or Temporary Injunction and Stay of Proceedings, both motions being filed by Respondent, for hearing. The Court heard evidence from Respondent.

The Court, after considering the evidence, arguments of counsel, and authorities, is of the opinion and rules that Respondent's motions for reconsideration, rehearing, stay or abatement of suspension pending appeal, and injunction, should be denied, and IT IS SO ORDERED.

1. IT IS THEREFORE ORDERED that Respondent, Benton Musslewhite, be suspended from the practice of law for a period of three (3) years, beginning on January 31, 1989, and ending on January 31, 1992.

2. IT IS FURTHER ORDERED that Respondent be enjoined during the three

(3) year suspension period from doing any of the following: (1) Practicing law (except where Respondent appears pro se); (2) Performing legal services for others; (3) Accepting fees directly or indirectly for legal services performed during the suspension; (4) appearing a counsel or in any representative capacity in any proceeding in any court or before any administrative body; (5) Holding himself out to others as an attorney or lawyer; or (6) Receiving or accepting, or agreeing with anyone to receive or accept, any fee, fee interest, or compensation in return for referring any person during the three (3) year suspension period to another attorney as a client or potential client. However, Respondent shall be permitted to receive fees for work performed or cases referred prior to the period of suspension, notwithstanding the fact that the fees

may be received during the period of suspension.

3. IT IS FURTHER ORDERED that Respondent shall on or before December 31, 1988, do all of the following: (1) Mail written notice to all current clients, opposing counsel, and courts in which Respondent has pending matters as an attorney of record, notifying them of his there (3) year suspension and of his inability to continue to represent such clients; (2) Deliver all papers, files, monies or other property belonging to current clients to such clients or to an attorney designated by any such clients or to their current attorneys in the case or matter; (3) Refund to clients any unearned fees, monies or other property belonging to current clients to such clients or to an attorney designated by any such clients; and (4) File an affidavit with the General Counsel of the

State Bar of Texas verifying that he has given written notice, delivered client property, and refunded unearned fees, all as provided herein.

4. IT IS FURTHER ORDERED that Respondent shall surrender his Texas Law License and permanent State Bar Card to the Clerk of the Supreme Court of Texas, on or before January 1, 1989.

5. IT IS ALSO ORDERED that the Court shall continue to employ the provisions of State Bar Rules art. X Sec. 33; that Hartley Hampton shall continue his appointment as Custodian for the purposes only of verifying Respondent's compliance with the provisions of Paragraph Three (3); and that the Court shall maintain and continue jurisdiction over Respondent's law practice.

6. IT IS FURTHER ORDERED that Hartley Hampton shall be compensated at a reasonable rate to be established by the

Court and to be paid out of available attorneys' fees accruing to Respondent, and Hartley Hampton shall file with this court a final fee application no later than February 1, 1989.

7. IT IS FURTHER ORDERED that Respondent furnish to Hartley Hampton within ten (10) days of this Order a list of all current clients of Respondent with the following information about each client: (1) Name, address, and telephone number of the client; (2) Full style of lawsuit to which the client is a party; (3) Name, address, and telephone number of all other attorneys representing the client.

8. IT IS FURTHER ORDERED that respondent shall be subject to further order of the Court relating to Respondent's law practice, after notice and hearing. However, Respondent shall have the right, upon notice and hearing,

to move the Court upon a showing that he has complied with the notice and other requirements of this Order, to terminate the Court's assumption of jurisdiction over Respondent's law practice.

9. IT IS FURTHER ORDERED that all costs of Court incurred since the Court signed the Judgment on January 29, 1988 shall be borne by Respondent.

SIGNED: November 21, 1988

/S/Solomon Casseb
JUDGE PRESIDING

APPROVED:

Office of General Counsel
State Bar of Texas

/S/
Steven M. Smoot
First Assistant General Counsel
State Bar of Texas
State Bar No. 18774300
P.O.Box 12487
Austin, Texas 78711
512/463-1381
ATTORNEYS FOR PETITIONER

APPROVED AS TO FORM ONLY;

/S/
Theo W. Pinson
Greenwood, Koby, Old, Pinson
& Bussey
State Bar No. 160180000

1900 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019
713/523-2727

ATTORNEY FOR RESPONDENT

APPENDIX B

NO.86-44452 (Consolidated)

THE STATE BAR OF TEXAS	[ ]	IN THEDISTRICT
	[ ]	COURT
	[ ]	
	[ ]	OF
	[ ]	
V.	[ ]	HARRIS COUNTY,
	[ ]	TEXAS
	[ ]	
BENTON MUSSLEWHITE	[ ]	270TH JUDICIAL
	[ ]	DISTRICT

NO. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS	[ ]	IN THE DISTRICT
	[ ]	COURT
	[ ]	
	[ ]	OF
	[ ]	
V.	[ ]	HARRIS COUNTY,
	[ ]	TEXAS
	[ ]	
BENTON MUSSLEWHITE	[ ]	151ST JUDICIAL DISTRICT

ORDER

Came on this day for consideration the Motion of Respondent pursuant to Rule 47 (a), (h), (i), (j) and (k) of the Texas Rules of Appellate Procedure for Setting of Security and Suspension of Enforcement of the Judgment Revoking

Probation, Pending Appeal, and the Court being of the opinion that same is not meritorious, it is therefore

AGREED, (sic), ORDERED and ADJUDGED that Respondent's Motion is denied seeking the relief therein.

IT IS SO ORDERED.

SIGNED THIS THE 12 DAY OF JANUARY, 1989.

/S/ Soloman Casseb, Jr.
J U D G E PRESIDING

APPENDIX C

OPINION

IN THE

COURT OF APPEALS

FOR THE

FIRST DISTRICT OF TEXAS

NO. 01-89-00033-CV

BENTON MUSSLEWHITE, Relator

V.

THE HONORABLE SOLOMON CASSEB, PRESIDING JUDGE OF THE 270TH DISTRICT COURT OF HARRIS COUNTY, TEXAS, Respondent

==========

Original Proceeding On Motion For Leave To File For Writ of Mandamus, Prohibition, and Injunction

==========

Realator, Benton Musslewhite, asks this Court to order respondent, The Honorable Solomon Casseb, presiding judge of the 270th District Court of Harris County, Texas, to stay, pending appeal,

relator's suspension from the practice of law.

Relator attacks the constitutionality of various State Bar Rules relied upon on the underlying disciplinary proceeding but primarily contends that article X, section 24 of the State Bar Rules, reprinted in appendix to Tex. Gov't Code, Title 2, Subtitle G (Vernon 1988), which prohibits a supersedeas or stay of an attorney's disciplinary suspension pending appeal, is unconsititutional.

The Texas Supreme Court has the constitutional, legislative, and inherent authority to promulgate rules controlling the admission and disbarment of attorneys. Tex. Const. Art. II, sec. 1; Tex. Gov't Code Ann. sccs. 81.024, 81.061 (Vernon 1988); Eichelberger v. Eichelberger, 582 S.W.2d 395,398 fn. 1 (Tex. 1979); see also Comment, The

Supreme Court's Power over Admission and Disbarments: Inherent or Staturoty?, 25 Baylor L. Rev. 368 (1973). The Texas Supreme Court in its order effective June 11, 1979, reprinted in 583-584 S.W.2d xxxiii-xxxv (Texas Cases), stated that it is the supreme court's duty "in the exercise of its inherent power to regulate and control the practice of law and to provide for the proper administration of justice." The supreme court in its preamble to the State Bar Rules stated that "these Rules are adopted in aid of the Court's inherent power to regulate the practice of law."

This Court, as an intermediate appellate court, is without authority to consider the constitutionality of rules promulgated by the Texas Supreme Court in the exercise of its inherent powers. See Banales v.Jackson, 601 S.W.2d 508 (Tex. Civ. App.--Beaumont), motion denied, 610

S.W.2d 732 (Tex. 1980). This Court also is without authority to stay the operation of a rule promulgated by the Texas Supreme Court. The question of the constitutionality of article X, section 24 and other State Bar Rules must be addressed to the Texas Supreme Court.

The motion for leave to file a petition for writs of mandamus, prohibition, and injunction is overruled.

PER CURIAM

Panel consists of Justices Warren, Dunn, and Hughes.

Do not publish. Tex.R.App.P.90.

Judgment rendered and opinion delivered January 19, 1989.
True copy attest:

/S/ Kathryn Cox
Kathryn Cox
Clerk of the Court

APPENDIX D

SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 25, 1989

Mr. Benton Musslewhite
1535 Mellie Esperson Bldg.
815 Walker Avenue
Houston, TX 77002

Mr. Steven M. Smoot
First Assistant General Counsel
State Bar of Texas
P.O. Box 12487
Austin, TX 78711

RE: Case No. C-8321

STYLE: BENTON MUSSLEWHITE
V. THE HONORABLE SOLOMON CASSEB, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas granted relator's motion to expedite hearing and overruled the motion for leave to file petition for writ of mandamus, prohibition and/or injunction in the above case.

Respectfully yours,

Mary M. Wakefield, Clerk

By:/s/ Barry E. Pickett,
Deputy

cc:

Hon. Solomon Casseb, Jr.
127 East Travis Street
San Antonio, TX 78205

Hon. Alice Oliver Trevathan
Judge, 151st District Court
1019 Congress, 16th Floor
Houston, TX 77002

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of Court

February 2, 1989

Mr. Bob Hager
Suite 103
Pennsylvania Ave., NW
Washington, DC 20006

Re: Benton Musslewhite,
v. State Bar of Texas and
Solomon Casseb, Judge,
Harris County, Texas-
Application No. A-611

Dear Mr. Hager:

The application for a stay and other relief pending the timely filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to Justice White, who on February 2, 1989 endorsed thereon the following:

"Application is Denied

Byron R. White
2/2/89"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Edward L. Turner, Jr.
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of the Court

AREA CODE
479-3011

NOTIFICATION LIST

Mr. Bob Hager
Suite 103
Pennsylvania Ave., NW
Washington, DC 20006

Mr. Benton Musslewhite
1535 Mellie Esperson
815 Walker
Houston, TX 77002

Mr. Steve Smoot
Asst. Attorney General
State Bar Bldg., Capitol Sta.
Austin, TX 78711

Mr. Solomon Casseb
270th Jud. Ct. of Harris Cty.
127 East Travis
San Antonio, TX 78205

APPENDIX F

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

J. CURTISS BROWN
Chief Justice

MARY JANE SMART
Clerk

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
ROSS A. SEARS
BILL CANNON
JOE E. DRAUGHN
GEORGE T. ELLIS

JUSTICES

HELEN A. CASSIDY
Chief Staff Attorney

PHONE
713-655-2800

February 16, 1989

Hon. Benton Musslewhite
609 Fannin
Suite 517
Houston, TX 77002

Hon. D. Craig Landin
Conner, Odom & Clover
P. O. Box 570
Sealy, TX 77474

RE: CASE NO. 14-89-00041-CV TRIAL COURT CASE NO. 86-4452

STYLE: Musslewhite, Benton V: The State Bar of Texas

Counsel:

Please be advised that on this date,

the Court DENIED motion pursuant to Rule 49(b), in the above cause.

Respectfully yours,

MARY JANE SMART, CLERK

By /S/ Mary Jane Smart
Deputy

APPENDIX G

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 14, 1989

Mr. Benton Musslewhite
1535 Mellie Espeson Bldg.
815 Walker Avenue
Houston, TX 77002

Ms. Linda A. Acevedo
Assistant General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

Mr. Steven D. Peterson
Office of the General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711

RE: Case No. C-8485

STYLE: BENTON MUSSLEWHITE
v. THE HONORABLE SOLOMON CASSEB and THE STATE BAR OF TEXAS No.86-44,452 in the 270th District Court, Harris County Original Mandamus/Prohibition/Injunction Proceeding

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for

leave to file petition for writ of mandamus, prohibition and injunction in the above styled case. Relator's motion to expedite was granted. Relator's motion for temporary relief was overruled.

Respectfully yours,

John T. Adams, Clerk

By/S/ Peggy Littlefield
Peggy Littlefield, Chief Deputy

cc:
Solomon Casseb, Jr.
49 District Court
Webb County Courthouse
1000 Houston Street
Laredo TX 78040

APPENDIX H

DISCIPLINARY RULES

Section 22. Conduct Constituting Threat of Harm to Clients

(A) Evidence of Irreparable Harm. Upon receipt of evidence of just cause demonstrating that a lawyer poses a substantial threat of irreparable harm to his clients or prospective clients, the appropriate grievance committee shall authorize counsel to seek the interim suspension of such lawyer as hereinafter provided. Authorization for interim suspension shall require the affirmative vote of two-thirds (2/3) of the committee members present and voting.

Immediate Interim Suspension. The court may enter an order in the nature of a temporary restraining order immediately suspending the lawyer pending the final disposition of a

disciplinary action predicated upon the conduct causing the harm or may order such other action as deemed appropriate. In the event the order is entered, the court may appoint a custodian pursuant to Section 33 to proceed clients' interests. The matter shall then proceed as in cases of temporary injunctions under the Texas Rules of Civil Procedure.

(C) Notice to Client. A lawyer suspended pursuant to paragraph (B) shall comply with the notice requirements in Section 32.

Section 26. Compulsory Discipline

(A) Generally. When an attorney has been convicted of a serious crime, counsel shall initiate an action seeking compulsory discipline pursuant to this section. Except as otherwise

provided in this section, the provisions of this Article relating to the procedure in disciplinary actions shall apply to actions brought hereunder. Proceedings hereunder are not exclusive in that an attorney may be tried on the underlying facts as well as upon the conviction itself.

(B) Serious Crime Defined. A serious crime, for the purpose of this section, shall be any felony involving moral turpitude or any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property. A conviction for the attempt, conspiracy, or solicitation of another to commit a serious crime shall also be deemed to be a conviction of a serious crime for the purposes of this rule. The determination of whether a particular conviction constitutes a conviction of a serious crime is a

question of law to be determined by the court.

(C) Evidence of Guilt. In any action brought to discipline an attorney who has been convicted of a serious crime, the records of conviction shall be conclusive evidence of the guilt of the attorney for the crime of which the attorney was convicted.

(D) Commencement of Suit. Discipline under this section shall be initiated by the filing of a disciplinary petition in a district court of the convicted attorney's residence. Said petition shall allege the conviction and shall seek the appropriate discipline as provided herein.

(E) Procedure. The district court shall proceed to hear and determine all questions of fact and law as

hereinafter provided without the aid of a jury. When an attorney has been convicted of a serious crime in any trial court of competent jurisdiction, the attorney shall be suspended from the practice of law pending any appeal of that criminal conviction. Upon introduction into evidence in the disciplinary action brought hereunder of a certified copy of the judgment if conviction and sentence and a certificate of the clerk that the attorney is licensed by the Court, the district court in which the disciplinary action is pending shall promptly determine whether the attorney has been convicted of a serious crime. Unconverted affidavits that the attorney is the same person as the person convicted in the criminal action and that the attorney is a resident of the county in which the disciplinary

action is brought shall constitute competent and sufficient evidence of those facts. Nothing contained herein shall prohibit proof of the necessary elements in such proceeding by competent evidence in any other manner permitted by law. The district court shall set, hear, and determine whether the attorney should be disciplined within forty-five (45) days of the answer day; however, any failure to do will not affect its jurisdiction to act. any suspension ordered pending appeal of a criminal action shall be interlocutory.

(F) Disbarment. When an attorney has been convicted of a serious crime in any court of competent jurisdiction and that conviction has become final, the attorney shall be disbarred, except as provided in paragraph (G) below. If the attorney has been suspended pending

the appeal of the criminal conviction, a motion for final judgment of disbarment shall be filed in the pending disciplinary action. If the motion is supported by affidavit or certified copies of court documents showing that the conviction has become final, the motion shall be granted without hearing, unless within ten (10) days following service of the motion upon the convicted attorney or his or her attorney of record, pursuant to Rule 21a of the Texas Rules of Civil Procedure, the convicted attorney files a verified reply contesting the finality of the judgment, in which event the court shall conduct an evidentiary hearing to determine such issue. If no disciplinary action is pending when the attorney's conviction becomes final, disbarment shall be initiated by the filing of a

disciplinary petition pursuant to this section.

(G) Suspension. If an attorney's sentence upon conviction of a serious crime is fully probated, or if an attorney receives probation without an adjucation of guilt, the attorney shall be suspended during the term of such probation; however, upon notice and hearing, the court in the disciplinary action may impose upon an attorney who has received probation such further disciplinary sanction as may be warranted, including disbarment. If an attorney is suspended during the term of probation, such suspension is conditioned upon the attorney satisfactorily serving the terms of such probation. If probation is revoked, the attorney shall be disbarred as herein provided.

SECTION 24.

Appeal: No Supersedeas

Either party by a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise.

DR 2-101. Publicity and Advertisting

(A) A lawyer shall not make, on behalf of himself, his partner, associate, or any other lawyer, any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Contains a statement of opinion as to the quality of legal services;

(3) Contains a representation or implication regarding the quality of legal services which

is not susceptible to reasonable verification by the public;

(4) Contains predictions of future success;

(5) Contains statistical data which is not susceptible to reasonable verification by the public;

(6) Contains other information based on past performance which is not susceptible to reasonable verification by the public;

(7) Contains a testimonial about or endorsement of a lawyer;

(8) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve.

(B) A lawyer who publishes, advertises, or broadcasts, with regard to any area of the law in which he practices must, with respect to each area of the law so advertised, publish

or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(C) Each lawyer whose name is either published, advertised, or broadcast pursuant to DR 2-101(B):

(1) Who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with respect to each area, "Board Certified, (area of specialization) --Texas Board of Legal Specialization."

(2) Who has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised must state with

respect to each area, "Not certified by the Texas Board of Legal Specialization." Where the area so advertised has not been designated as an area in which a lawyer may be awarded a Certificate of Special Competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area." Such statements must be displayed conspicuously so as to be easily seen or understood by any consumer.

(D) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication media in anticipation of or in return

for publicity in a news item, except that the provisions of this paragraph shall not prohibit payment of the cost of lawyer advertising permitted under this rule.

(E) A lawyer who makes or causes to be made any form of written, recorded or broadcast public communication shall retain a copy of same for a period of four (4) years from the date such communication is first made or caused to be made.

DR 2-107. Division of Fees Among Lawyers. (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not

prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

APPENDIX I-1

Newsday
May 15, 1986

Excerpts from

AGENT ORANGE LAWYERS PROBED

By Carolyn Colwell

The Texas State Bar Association is investigating allegations that two Houston attorneys solicited Agent Orange cases, some of which apparently came from a Manhattan veterans group.

The same investigation involves possible solicitation through a second veterans group of cases resulting from the Grander air crash, which killed 248 American soldiers.

Both of the attorneys, Benton Musslewhite and John O'Quinn, who helped manage the class-action brought by thousands of Vietnam veterans,

acknowledged that they are under scrutiny by the Texas bar. They deny any wrongdoing.

And while Texas bar officials have refused to confirm or comment on the investigation, Agent Orange veterans and others in Texas, Washington, D.C., and Long Island say they have been contacted by a Texas bar investigator. Some of the veterans said the investigator asked them about how the lawyers obtained their clients.

Sources aware of the investigation say that it is wide-ranging and involves additional attorneys and other personal injury cases.

Musslewhite, who has claimed he represents over 2,000 Agent Orange plaintiffs, confirmed Tuesday that he is being investigated for soliciting Agent Orange and Gander cases.

. . .

"That's a hell of a note to say we solicited Agent Orange," said Musslewhite, who has led the opposition to the $180-million settlement of the Agent Orange case. "No possible way," he added. Musslewhite said all his Agent Orange cases were referred to him by some attorneys across the country. Court records show that Musslewhite has said the majority of his cases were referred by Todd Ensign, a New York attorney who is general counsel to a veterans' group known as Citizen Soldier.

All of the referrals were "perfectly legitimate," Musslewhite said.

Musslewhite said he paid a referral fee to Ensign, adding that Ensign also worked on the Agent Orange case. In New York, an attorney may share a fee on a referred case if he also works on or takes some responsibility for the

case. Musslewhite would not say how much Ensign's referral fee was.

Ensign also declined to comment on the nature of his fee arrangement with Musslewhite, although he acknowledged that his organization sent Agent Orange veterans to Musslewhite.

. . .

Musslewhite said the Texas bar also is investigating whether another veterans' group, United Veterans of America, passed out information about him and O'Quinn to solicit three cases resulting from an air crash in Gander, Newfoundland. Musslewhite again said these cases were normal referrals.

Musslewhite said he received the referrals because veterans are grateful to him the Agent Orange case.

O'Quinn has participated in major-disaster litigation such as the case involving the Ocean Ranger oil rig and

has a reputation for competence and honesty, according to Tom Weatherly, a senior partner at Vinson & Elkins which was former Gov. John Connally's old firm. O'Quinn declined to comment on the bar investigation.

But his Houston attorney, David Berg, said he would confirm "leaks" that the bar is investigating O'Quinn in connection with solicitation of Gander cases.

In relation to Agent Orange, Berg added, "It's just a general investigation of virtually every lawyer, at least any lawyer in this city, who was involved in the Agent Orange case." Berg said he assumes the Agent Orange investigation concerns soliciting, an allegation O'Quinn denies.

Berg added, "All I can say is what they say in Texas: No matter how thin

APPENDIX I-2

THE NATIONAL LAW JOURNAL
June 2, 1986

Excerpts from

Allegations of Solicitation

Army, Lawyers Feud Over Crash

By Gary Taylor
Special to The National Law Journal

HOUSTON - Two prominent local attorneys have declared war on the U.S. Army over its comments about solicitation of clients after last December's crash of an Arrow Air DC-8.

The attorneys - Benton Musslewhite, a sole practitioner here, and John O'Quinn of O'Quinn & Associates - have criticized the Army for mentioning their names in discussing complaints from families of some soldiers killed in that disaster near Gander, Newfoundland. The Army has called the whole matter a misunderstanding.

Both Messrs. Musslewhite and O'Quinn

noted that the Army has compiled its own list of firms specializing in aircraft matters, which was sent to potential plaintiffs - neither of the lawyers appears on the list - and that it has sent legal assistants to explain litigation procedures to the dead servicemen's families.

The dispute probably will not go much further than the exchange of letters that already has occurred.

But, in the process, the Army has claimed there were several solicitation problems stemming from the disaster, which claimed the lives of 248 servicemen. (NLJ. Feb 3.)

"A number of attorneys have initiated contacts. There was a great deal of it at first," said Maj. John Meixell, deputy at the Office of the Judge Advocate General in Washington, D.C.

Monitoring Situation

So far, Major Meixell has not forwarded any complaints to local bar associations for investigation. But he said his office is maintaining a file on the problem and will continue to monitor the situation.

The major was quick to emphasize that he has not been critical of Messrs. Musslewhite and O'Quinn and that he never initiated any discussions about the solicitation complaints filtering into his offie.

But Major Meixell described one instance in which a man claiming to be a minister called a grieving family with an offer to lead them in a telephone prayer session. After the "amens" were said, the alleged minister followed up with some legal referrals.

In another case, a man contacted a family

two days after the crash and asked to speak with the dead soldier. When told about the mishap, he identified himself as an investigator for a law firm and offered to help find attorneys to handle the litigation.

Neither of those incidents involved Messrs. Musslewhite and O'Quinn, who represent three servicemen's families through referrals from veterans familiar with Mr. Musslewhite's work seeking awards for Vietnam servicemen injured by the defoliant Agent Orange.

Responding to the press reports mentioning his name, Mr. Musslewhite fumed: "The Army should spend its time cleaning up its own house by doing something about the planes on which it flies servicemen. If my clients cannot refer lawsuits to me, I may as well close up shop."

Added Mr.O'Quinn: "Even though the

Army is not a defendant in the crash, they are not disinterested."

Mr. Musslewhite predicted that the Army may eventually end up as a defendant in some suits, and he charged that it has overstepped its bounds in helping the families locate private counsel.

. . .

Major Meixell also compiled a list of eight private firms boasting experiene in aircraft litigation, and forwarded that list to the families.

When some other firms complained about their omission from the list, he said, his office reviewed their credentials and added three more firms.

'Overreacting'

The existence of those lists prompted Mr.O'Quinn to charge that the Army itself is soliciting on behalf of the firms it has listed.

Major Meixell said Mr. Musslewhite and Mr. O'Quinn are "overreacting" to published reports of his comments.

After reading a letter from Mr. Musslewhite, the major said: "I'm at a loss as to why he's so upset. By having free legal-assistance attorneys available to the families we informed them of their rights. We checked with the American Bar Association and they had no referral list on airline crashes. The families have received a worthwhile service."

. . .

But Mr. Musslewhite remains unimpressed.

"I just can't believed they jumped on us." he said. "They criticized all the lawyers who got cases without being on their list. I've spent $300,000 of my own money on the Agent Orange cases. I'm steamed about it."

APPENDIX I-3

The Texas Lawyer
June 11, 1986
Vol. 2, No. 11

Excerpts

Bar investigating alleged solicitation

By Ronda Baker

The State Bar of Texas is investigating 17 Houston-area lawyers for alleged misconduct and one of the lawyers under scrutiny said he thinks most if not all of the allegations deal with improper solicitation of clients.

. . .

Houston solo practitioner Benton Musslewhite said he received a letter from the bar asking him how clients were referred to him in the Agent Orange and Arrow Air crashes and several other personal-injury cases during the last several years. Musslewhite calling the investigation a "witchhunt." denied any wrongdoing and

said he had not heard from bar investigators since responding to that letter.

"This is a broad-brush type of inquiry. They're asking me how I was hired in those cases. The day they make that (legitimate referrals) illegal, we can all shut down our offices and go home."

Musslewhite represents three clients in the Gander, Newfoundland crash case with Houston lawyer John O'Quinn, who is reportedly under investigation by the same Houston grievance committee, and Miami lawyer Charles Lipcom. O'Quinn has said the bar is looking into the way he and Musslewhite signed up clients in that and the Agent Orange cases. Musslewhite and O'Quinn were on the nine-lawyer team that helped negotiate the establishment of a $180 million

settlement fund for victims with several chemical companies who manufactured the defoliant.

. . .

The Army provided each victim's family with a legal assistant to help the family locate a lawyer and negotiate fees. Also provided was an Army prepared list of law firms experienced in aviation laws. The firms had been involved in negotiations with the Army to reduce fees by about 15 percent overall, a Pentagon spokesman has been quoted as saying.

Musslewhite and the Houston lawfirm O'Quinn & Associates were not on the list.

Maj. John Meixell of the Office of Judge Advocate General in Washington has said some non-listed lawyers hired in the case used representatives of veterans organizations to solicit cases

or left newspaper clippings about awards won for clients. But Meixell has not forwarded any complaints to local bar associations, he has said.

Musslewhite said he sent Meixell an angry letter regarding Meixell's comments. He accused the Army of trying to get a client to change lawyers after he had been hired to represent the client.

"After the client had hired us, a lieutenant from the judge advocate general's office on a particular (Army) base approached him with a brochure about a lawyer on the list." Musslewhite said. He declined to name the lawyer but said it was someone he "was at odds with on the Agent Orange case and who did a very poor job of settling the case."

Musslewhite accused the Army of using the list to suggest firms that

would overlook what he says is a case arguably not covered by the Feris Doctrine, which exempts the military from being sued by servicemen.

Musslewhite said O'Quinn has also been asked about the way he obtained clients in connection with the Delta crash. The two lawyers jointly represent one Delta client and Musslewhite said the bar has not asked them how they obtained that client.

The San Antonio Light has reported that the bar is also looking into allegations that O'Quinn made improper ex parte communications with Texas Supreme Court Justice C. L. Ray while O'Quinn had a case pending before the court. The allegations were made in a public hearing of the Houston Committee on Judicial Affairs, which is investigating alleged misconduct by Supreme Court justices.

O'Quinn's attorney, David Berg of Houston, said he had advised his client not to comment on the investigation which he said has been going on for six months.

Berg resigned as chairman of the State Bar District 4-B grievance committee in Houston because of a bar policy, passed in April, prohibiting committee members from representing any lawyer under investigation for misconduct. The District 4-C committee, whose chairman is Larry Dougherty, is carrying out the investigation of O'Quinn. Berg said.

. . .

Musslewhite said he has informed the bar that most of his more than 2,000 Agent Orange clients were referred to him through Todd Ensign, general counsel for Citizen Soldier, a Manhattan veterans group. At least one

of the three Gander clients was referred to him by the Brotherhood of Vietnam Veterans, affiliated with Citizen Soldier, he said.

"I do not pay somebody to bring me cases." Musslewhite said. "If anybody says I do, I want to see the whites of their eyes in the courtroom."

Musslewhite said the bar doesn't "have one single complaint from any client or potential client" about him. "We have one of these witchhunts about every 30 years."

He accused the bar of being defense-oriented and said the litigation crisis has set corporate defendants on a scheme to discourage plaintiffs.

"Insurance companies, chemical companies and manufactories have become very frustrated the last three or four years with the legal process." Musslewhite said. "They think the

best way to fight the litigation crisis is, No. 1, to intimidate plaintiff's lawyers by investigations so good lawyers will get out of the business."

APPENDIX I-4

Express News
San Antonio's quality newspaper--
largest circulation in South Texas

TEXAS BAR TARGETS 'AMBULANCE CHASERS'
Four Named in Allegations of Improper Solicitation

By Jerome P. Curry

Express News Staff Writer

Four lawyers have been charges with improper solicitation of clients by the State Bar of Texas and six others are facing action after the State Bar launched a secret probe into what it calls an international ambulance-chasing scandal.

The State Bar investigation, carrying the code name Masters of Disaster, is outlined in secret files obtained by the Express-News.

One State Bar target, Benton Musslewhite of Houston and one of the best known personal injury lawyers in Texas, called the inquiry and

subsequent disciplinary action a "vendetta by corporations and insurance companies."

Musslewhite already had been ordered by Judge Solomon Casseb of San Antonio to begin serving on Jan. 29 a three-year suspension from law practice in Texas.

"You'll have to admit old Musslewhite has tackled some seriously big windmills," said Richard "Racehorse" Haynes of Houston, one of the best-known criminal defense lawyers in Texas. "And a lot of people backing the Establishment were on the other side of the docket."

Both Musslewhite and Haynes were on a "hit list" of 10 Houston lawyers in connection with allegations of improper solicitation of clients from disasters in India and numerous Pacific and European countries, as well as the United States.

Both Haynes and sources at the State Bar said Haynes was cleared. The criminal lawyer's appearance on the inquiry's agenda was especially curious because, as Haynes noted, he does not practice personal injury law.

Musslewhite said he was convinced that Haynes was on the list simply because he had represented him at one time in State Bar grievance proceedings.

Haynes did not disagree.

"Your sources are right," the defense lawyer said. "I represented some of the attorneys at one time, and a witness. There was some suggestion of conflict. But I did not represent them in the same proceedings. There was nothing to it. They know that."

According to grievance committee files, the charges of improper seeking of clients involved cases as diverse as the continuing Agent Orange litigation

in behalf of Vietnam veterans to the sinking of the Ocean Ranger rig off Newfoundland in 1983.

Settlements in the Agent Orange cases already total more than $180 million. A $22 million settlement was reached in behalf of injured and slain workers and their families in the Ocean Ranger case.

State Bar discipline litigation, which can include disbarment or suspension, is pending in state district courts against lawyers John O'Quinn, Newton Schwartz and Doug Cherry.

All except Cherry have been associated in some way with Mussalewhite's international practice in behalf of disaster victims. Mussalewhite, O'Quinn and Schwartz were all on the national legal steering committee in the Agent Orange cases.

Mussalewhite believes he is the

lightning rod for vengeance-seeking corporations. Their attorneys, he said, "see nothing amiss about corporate lawyers taking a few dollars to a disaster scene and having releases signed; but the same lawyers scream when other attorneys remind a corporation's victims of their rights."

In one case memorandum, a State Bar investigator wrote of Musslewhite that he offered his services as an attorney to clients who had not sought his advice:

"Specifically including but not limited to victims, survivors, next of kin or surviving family members of the following disasters or accidents: 'Agent Orange' litigation, Air Arrow DC-8 crash, AMC fire, Arctic Explorer sinking, Bhopal, India Union Carbide chemical spill, Challenger space shuttle explosion, DC-3 cases, English

Global Marine cases, Global sinking, Sikorsky helicopter cases, the silicosis cases."

Musslewhite said it appeared to him he had been selected by the Establishment lawyers as the man to get.

. . .

APPENDIX I-5

The Houston Post
July 21, 1987

Houston attorney fights bar's disciplinary action

By HOPE E. PAASCH
Post Reporter

Houston attorney John O'Quinn, known for his high-dollar settlements and successes in personal injury cases, is fighting a State Bar of Texas disciplinary action against him by attacking the appointment of a special prosecutor.

O'Quinn was represented in court Monday by defense attorney Richard "Racehorse" Haynes and constitutional law expert Gerald T. Treece, who argue O'Quinn is being subjected to selective prosecution by an improperly appointed special prosecutor for violation of a state bar rule that may be

unconstitutional.

The disiplinary action filed last February in state district court against O'Quinn charges he paid non-lawyers to solicit clients, an action banned by state bar rules.

Also in February, the state bar board of directors voted to appoint Houston attorney Tom Alexander as a special prosecutor to handle the case against O'Quinn, as well as disciplinary cases against attorneys Benton Musslewhite and Newton B. Schwart.

The Supreme Court of Texas refused to approve a budget item to pay Alexander for his work, and the attorney has agreed to donate his services.

State District Judge Richard Millard began a hearing Monday on several pre-trial issues raised by O'Quinn's

attorneys. The hearing is scheduled to resume at 9 a.m. today.

The issues include whether Alexander was properly appointed and thus has standing to prosecute the case; whether the state bar's rule against solicitation violates the Constitution; and whether O'Quinn's constitutional rights are being violated by selective prosecution.

Most of Monday's testimony was aimed at whether Alexander has any standing to act as a special prosecutor.

APPENDIX I-6

NEWS
ABA JOURNAL
September 1, 1986

UNDER THE SOLICITATION GUN
Allegations spur probe of 17 Texas lawyers

The eyes of the State Bar of Texas are upon allegations of improper case solicitation. The bar's widespread investigation involves at least 17 lawyers, many of whom practice personal injury law.

The allegations tend to center on Agent Orange cases, the Arrow Air crash at Gander, Newfoundland, which killed 248 U.S. soldiers, the Delta Airlines crash at Dallas and workers' compensation claims allegedly funneled through a Houston firm.

Under scrutiny are Houston lawyers Benton Musslewhite, John O'Qujinn and the Houston personal injury firm,

Schechter, Eisenman & Solar. Houston lawyer Newton Schwartz also is said to be under investigation, but he said he has received no notification from the bar regarding it.

Musslewhite, O'Quinn and Schwartz were part of the nine-lawyer team that negotiated a $180 million settlement for Agent Orange victims in May 1984.

Because grievance proceedings against lawyers are confidential by state law, bar officials declined to comment onthe matters.

Musslewhite, however, confirmed that he is being investigated for alleged solicitation of Agent Orange cases as well as cases resulting from the Arrow Air crash.

He said he received a letter from the bar in April asking him how clients were referred to him.

Musslewhite denied wrongdoing "I have always received cases from other lawyers or from legitimate organizations like veteran's associations," he said.

Musslewhite suggested the bar's intensified interest in case solicitation has its roots in press coverage of the Aug. 2, 1985, Delta air crash in Dallas, which killed 133 people. He said both he and O'Quinn handled cases resulting from that crash.

Two days after the crash, two lawyers - Melvin Belli's son, Caesar, and co-worker Richard Brown - arrived from San Francisco at a hotel where many of the victims' families were staying. In the wake of press stories about their presence, they said they were invited to Dallas by clients who had relatives in the crash.

"[Caesar] Belli came over here ..." Musslewhite said, "and the bar criticized him and started an investigation into it and into high-visibility lawyers in other cases receiving national attention, like Agent Orange, the Air Arrow crash and Bhopal [India]."

Houston lawyer David Berg, representing O'Quinn, confirmed that his client is also being probed regarding referrals but insisted that "O'Quinn is catching the heat for Benton [Musslewhite]."

Berg said, "He is involved insome cases with Musslewhite. Musslewhite referred some cases to him. But he is innocent of any wrongdoing."

The probe of Musslewhite comes on the heels of an ongoing investigation by the Texas Attorney General's Office of his connection with workers'

compensation cases tied to a Houston firm, the "Harris County Accidednt Board."

In July, the Harris County Accident Board, a private company accused of misleading workers' compensation claimants into thinking they were dealing with an official state board, was temporarily enjoined from using the words "Harris County" or "Board" in its name.

. . .

Musslewhite is one of the lawyers named in an affidavit a woman gave alleging that the Accident Board referred her to him. Musslewhite said he never met the woman, Wanda Clark, and that his firm never handled a case for her.

. . .

"It's a set-up," Musslewhite responded. "I think I was named to

spread the heat around among lawyers who were not involved. Only two firms do business with them regularly."

. . .

APPENDIX I-7

THE TEXAS LAWYER
FEBRUARY 2, 1987

EXCERPTS

THREE SUED BY BAR

HOUSTON LAWYERS NAMED IN DISCIPLINARY ACTIONS

By LINDA PONCE

The State Bar has filed disciplinary suits against two Houston lawyers and added charges to a 3 1/2 month-old suit against a third.

. . .

The Bar is seeking disciplinary action against Musslewhite in a separate suit filed Oct. 1, 1986, in 270th District Court in Houston.

On Jan. 19, first assistant general counsel Steve Smoot mailed a second amended disciplinary petition to the court, adding two counts to the suit already pending against Musslewhite.

. . .

The Bar is seeking disbarment suspensions or reprimand in each case.

The Bar's board of directors voted in November to hire a special prosecutor to handle the cases against Musslewhite, Schwartz and a third attorney whose name has not been released.

Board members would not say why Houston grievance committee had requested the special prosecutor to handle the cases - collectively referred by board members as the "Houston Solicitation cases" - in place of Bar general counsel Steve Peterson.

Grievance committee 4C chairman Larry Doherty, a partner in Houston Doherty & Williams, said a "multitude of reasons" led to the request. But he said it was "certainly not a reflection

on the general counsel's office." ...

The Houston cases stem from an investigation started last spring into alleged improper client solicitation primarily involving the Agent Orange cases, the August 1985 Delta Air Line crash at Dallas-Fort Worth Airport and the Arrow Air military transport crew at Gander, Newfoundland, in December 1985.

The investigation was handled by grievance committee 4C, chaired by L. Doherty and former assistant general counsel Thomas W. Johnson, who is in the Houston office.

Schwartz, Musslewhite and O'Quinn were among nine lawyers who negotiated a $180 million settlement in Agent Orange litigation in May 1984.

Both Musslewhite and O'Quinn acknowledged last year that they were being investigted and denied

wrongdoing.

But Schwartz, charging that Bar employees had leaked confidential information to a Houston Chronicle reporter, sued the newspaper.

Schwartz called the suit against him "strictly something they've drummed up" that is politically motivated.

"It's just another shot they're taking against us," he said. "This will be dismissed in due time."

He said he plans to challenge the jurisdiction of the grievance committee as he did last summer, when he was asked to testify during the investigation.

According to court papers, last July Schwartz asked that Doherty and the committee be disqualified from hearing Schwartz's case. ...

According to court records, Schwartz also claimed that the committee was

"tainted improperly" by Doherty's "personal prejudice and motives."

Doherty called the claim that he received privileged files "an absolute ... damn lie." Peterson said Doherty did not have access to the Bar's grievance files.

Both Peterson and Doherty said that the general counsel had given Doherty's name to two people who said they could not find a lawyer to file a malpractice suit against an East Texas lawyer. But Doherty said he and Peterson had not and were "never going to" split a fee in the case Doherty filed.

"He never asked for a fee over that," Doherty said.

Peterson added: "I don't refer cases other than for friends, and I don't accept referral fees." ...

Another grievance committee, to which O'Quinn won a change of venue

reportedly voted Nov. 19 to take disciplinary action against him. O'Quinn's lawyer, David Berg of Houston would not comment.

APPENDIX I-8

The Houston Post
February 27, 1987

Bar alleges misconduct by O'Quinn

The State Bar of Texas accused noted Houston lawyer John O'Quinn of professional misconduct in a lawsuit filed Thursday in 189th District Court.

The suit, which alleges O'Quinn paid non-lawyers to solicit cases for him and also set up an improper fee-splitting arrangement with Houston Benton Musslewhite, could lead to O'Quinn being disbarred, suspended or reprimanded. Neither O'Quinn nor Musslewhite could be reached for comment Thursday night.

The suit, filed by Assistant General Counsel Steven Smoot, alleges O'Quinn agreed to finance Musslewhite's law practice in return for a share of Musslewhite's fees.

Under the arrangement, the suit claimed O'Quinn would not perform any legal service nor assume any responsibility for representing the client.

O'Quinn, noted for the large judgments he has won in several personal injury cases, collaborated with Musslewhite as part of a team of lawyers across the country in gaining the controversial $250 million settlement of the Agent Orange lawsuit for Vietnam veterans.

The suit filed Thursday also accused O'Quinn of paying non-lawyers to secure cases for him and claimed he promised to pay or paid some non-lawyers a share of his fees in violation of Stater Bar rules.

The State Bar cited specifically a lawsuit involving the family of a soldier who died in December 1985 when

an Arrow Air charter plane crashed and burned at Gander, Newfoundland, killing 254 soldiers and crew members.

O'Quinn was asked in May 1986 to respond in writing to "various allegations of professional misconduct," the suit said, but failed to do so.

APPENDIX I-9

(Excerpts from)

The Houston Chronicle
May 10, 1987

Private investigator tells probers of 'ambulance chasing' for lawyer

By DIANNA HUNT

A man seriously injured in a drilling rig accident was contacted in his Houston hospital room by a private investigator trying to sign him up as a client for Houston attorney John O'Quinn, according to sworn statements from the investigator.

James C. McNeilly, who operates JCMI Investigations, says in the statement that the case was one of more than 150 he solicited as a "runner" for O'Quinn for more than a year.

The allegations of case-running or "ambulance chasing" are among several charges of possibly unethical or illegal conduct by O'Quinn and others

now under investigation by the State Bar of Texas and the Harris County District Attorney's office.

O'Quinn attorneys, David Berg and Richard "Racehorse" Haynes, issued a joint statement Friday in response to the allegations.

"In the fullness of time, no more than six to eight weeks from now, it will be clear that Mr. McNeilly is not a credible witness against Mr. O'Quinn or anyone else," the attorneys said.

"We remain confident that Mr. O'Quinn, after an airing of these issues in the (state) district court, will be vindicated," they said.

The attorneys said they are limited in what they can say about O'Quinn by a gag order from a federal judge in Galveston. The order remains in effect while Houston federal officials investigate allegations of jury

tampering in a record $105-million verdict there.

McNeilly's sworn statement was submitted April 30 to Houston private investigator Clyde Wilson, hired to probe the cases by the state bar's special prosecutor, attorney, Tom Alexander of Houston.

The affidavit has been turned over to the Harris County District Attorney's office and the U.S. Attorney's office in Houston.

"I've received some information from Mr. Wilson and the FBI is taking a look at the materials," said Assistant U.S. Attorney Scott Woodward, chief of the criminal division. He declined further comment.

District Attorney John B. Holmes Jr. has declined comment on the allegations.

McNeilly has been granted immunity

by state and federal prosecutors, and testified April 24 before a federal grand jury investigating the alleged jury tampering, said his lawyer Mark Vela of Houston.

In the case involving the drilling rig accident, McNeilly says O'Quinn told him of reports of an injury in Belize in Central America.

O'Quinn "told me he did not know the name of the company, but to go find out about it and sign the man up for him," McNeilly said in the statement.

After learning the man had been transferred to a Houston hospital, McNeilly said he "just went into his hospital room, introduced myself, and told him what a great lawyer John M. O'Quinn was and tried to sign him up," according to the statement.

In exchange, McNeilly said O'Quinn promised to pay him 25 percent of the

attorney fees he earned on the case, according to the statement.

The injury led to a federal lawsuit in 1985 filed by O'Quinn on the man's behalf. The case is pending before U.S. District Judge James DeAnda, although O'Quinn has been replaced by an attorney who formerly worked in his law firm.

McNeilly's statement raises allegations of case-running against at least eight other Houston attorneys in addition to O'Quinn. Allegations against the other lawyers will be turned over to the state bar for investigation and, perhaps, for hearings before a bar grievance committee, said special prosecutor Alexander.

McNeilly's statement also gives an insider's look into activities that allegedly go on behind the scenes at a

big disaster.

For example, McNeilly says he traveled to Dallas in August 1985 to sign up relatives of the 137 people who died in the crash of Delta Flight 191 at Dallas-Fort Worth Airport. He was so busy, he says, that he ran out of informational brochures.

"I recall that I ran out of brochures and needed some more of John O'Quinn's books to assist me in running the case, and another lawyer (in O'Quinn's office) supplied them to me," McNeilly says in the statement.

O'Quinn has filed several lawsuits on behalf of the survivors of those who died in the crash.

McNeilly said he also obtained credentials as an officer of the Panamanian government that would allow him to board ships at the Port of Houston to try to sign up injured

seamen.

"I had an identification card which enabled me to go aboard any ship flying the Panamanian flag," McNeilly said in the statement.

McNeily, a licensed private investigator, says he did standard investigative work as well as case-running. He says he was misled into believing his actions were legal, when they may not have been.

"My principal duties were to learn of accidents, contact the plaintiffs in the accidents, and sign them up with powers of attorneys for the various lawyers I have named," McNeilly says in the statement.

. . .

The agreements were not in writing. McNeilly says O'Quinn has paid him about $60,000, but allegedly owes him more than $300,000.

The state bar has filed disciplinary action including possible disbarment, against O'Quinn and Houston attorneys Benton Musslewhite and Newton Schwartz.

Alexander said the three attorneys allegedly used a network of runners- including McNeilly - to solicit clients at disasters.

Solicitation of cases is a violation of state bar ethics rules and could also violate state law.

Alexander said the affidavits submitted by McNeilly and others indicate case solicitation may be pervasive in the legal community. "It is far more severe than I anticipated." Alexander said.

Musslewhite has denied the allegations. Schwartz could not be reached for comment.

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APPENDIX I-10

(Excerpts from)

METROPOLITAN
The Houston Chronicle
April 28, 1987

State Bar probes 3 Houston lawyers, bribery allegations

By DIANNA HUNT

An East Texas man whose daughter died in a mobile home fire said he was paid $1,000 to sign away his rights to a lawsuit that later ended in a multimillion-dollar settlement benefiting his ex-wife and her attorney, according to sworn statements submitted to investigators.

Donald Keen, 27, of Henderson said a lawyer working with Houston attorney John O'Quinn also paid him $2,000 a few weeks later to "disappear" as a witness, according to the statements.

The allegations are among several charges of possibly unethical or

illegal conduct by O'Quinn and two other Houston lawyers under investigation by the State Bar of Texas.

The State Bar has filed suit seeking disciplinary action, including possible disbarment, of O'Quinn and attorneys Benton Musslewhite and Newton Schwartz. The lawyers have denied the allegations and are fighting the disciplinary action.

. . .

In 1984, O'Quinn filed a wrongful death suit in Matagorda County on behalf of Irene Hill over the death of her husband and children.

Keen said he was contacted in July 1985 by an attorney working with O'Quinn on the case who said Keen's ex-wife was unable to sign legal documents and that a guardian was needed for his daughter's estate.

After he agreed to sign the document, Keen said the lawyer offered to pay him a small amount of money then increased the amount to $3,000 which he paid in 30 $100 bills, according to Keen's statement.

The lawyer later returned to ask Keen not to testify, saying it could be detrimental to the case, the statement said.

He gave Keen $2,000 to take a "vacation" so he could not be contacted by defendants in the lawsuit, Keen's statement said.

The documents Keen signed, however, ultimately relinquished any claims he may have held in his daughter's death, said Keen's lawyer, Joe Shumate of Henderson.

State law prohibits tampering with or bribing a witness or potential witnesses.

Keen's affidavit was submitted to Houston private investigator Clyde Wilson, who has been hired by the State Bar's special prosecutor, attorney Tom Alexander of Houston, to investigate the cases.

The affidavits have been turned over to Harris County District Attorney John B. Holmes, Jr., who declined comment.

. . .

Alexander said the allegations are among several involving the three attorneys, who also allegedly used a network of runners or "ambulance chasers" to solicit clients at disasters such as airplane crashes.

Alexander said the investigation has been dubbed the "master of disasters," because of the tactics allegedly used to enlist clients.

The suit against O'Quinn accuses him of soliciting the parents of a soldier

who died in the 1985 crash of a charter plane in Newfoundland that killed all 258 soldiers aboard. O'Quinn has filed three suits stemming from the crash.

. . .

Alexander said the lawyers apparently used many of the same runners who operated a "network" and rushed to disaster scenes. They allegedly were paid according to the seriousness of the suits they uncovered, Alexander said.

"A broken-leg case was worth so much, a brain-damage case was worth so much, up to $100,00," Alexander said. "They were trading them kind of like they were trading pork bellies on the commodities market."

. . .

Among the cases O'Quinn has handled is the record $105-million judgment awarded in December to the family of a

chemical worker who died of leukemia as a result of exposure to toxic benzene.

The verdict against Monsanto Co. in Galveston is now the subject of an investigation by the FBI amid allegations of possible bribery of or tampering with a juror.

Musslewhite has called the State-Bar investigation a "witch hunt." Schwartz could not be reached for comment. O'Quinn's lawyer, David Berg, declined comment.

APPENDIX I-11

The Houston Chronicle
April 29, 1987

Houston lawyer denies charges of improperly soliciting clients

Houston lawyer Benton Musslewhite- one of three attorneys under investigation by a State Bar special prosecutor - denies allegations he has improperly solicited clients.

"I've never engaged in ambulance chasing." Musslewhite said Tuesday.

"My cases have come from lawyers, clients, legitimate organizations and those kinds of proper sources."

Musslewhite likewise said he has never been involved in any activity that could be construed as bribery of witnesses.

"I have not been accused of bribery by the bar association, and I'm

certainly not guilty of bribery," Musslewhite said.

An East Texas man has said in a sworn statement that he received $5,000 from an attorney working for lawyer John O'Quinn, who also is under investigation by the State Bar's special prosecutor, Tom Alexander of Houston.

Donald Keen, 27, of Henderson says he received $3,000 to sign away his rights to a lawsuit that later ended in a multimillion-dollar settlement benefiting his ex-wife and O'Quinn.

Keen said he also was paid $2,000 to "disappear" as a possible witness in the suit.

State law prohibits tampering with or bribing a witness or potential witness.

The State Bar has filed suit seeking disciplinary action, including possible

disbarment, against Musslewhite, O'Quinn and Houston lawyer Newton Schwartz.

APPENDIX I-12

(Excerpts from)

Houston Chronicle
May 28, 1987

Bar files 2nd suit against local laywer

By Bonnie Britt

The State Bar of Texas has filed a lawsuit seeking disciplinary action against Houston attorney Benton Musslewhite for allegedly using runners to solicit clients.

The lawsuit filed in a state district court in Houston on Wednesday, asks that Musslewhite be "disbarred, suspended and reprimanded." It is the second lawsuit filed by the bar alleging improprieties by Musslewhite.

Musslewhite could not be reached for comment but has previously denied any wrongdoing.

The suit alleges that at least seven non-lawyers recommended employment of

Musslewhite and attorney John M. O'Quinn to people who had not sought advice on hiring a lawyer.

Musslewhite and O'Quinn paid the runners for "recommending and securing" employment, according to the lawsuit. It further claims that fees were promised or paid to the runners.

Such acts constitute professional misconduct under State Bar rules.

"The accusations against me are untrue garbage," O'Quinn said.

The lawsuit was filed by Steven Smoot, first assistant general counsel to the State Bar, and Tom Alexander, special prosecutor in the cases against Musslewhite, O'Quinn and Newton Schwartz.

A lawsuit seeking disciplinary action was filed against Schwartz in January but has not yet to go to trial.

Alexander said attorneys will ask that the latest case against Musslewhite be tried quickly, as is allowed in disciplinary actions.

"This case is the result of months of investigation and could not have been filed without the help of Clyde Wilson," Alexander said.

Wilson, a private investigator, has been working for the State Bar in the case without pay.

The latest lawsuit also claims that Musslewhite arranged to split his attorney fees with O'Quinn in exchange for O'Quinn's financial backing of Musslewhite's practice.

O'Quinn would not work on the case and took the money without the knowledge and consent of the clients, the suit says.

State Bar rules label such acts as misconduct.

APPENDIX I-13

The Houston Post
May 29, 1987

By John Mecklin
and Hope E. Paasch

Allegation of jury tampering untrue, sources report

Claims against lawyer in Monsanto case unraveling; confusion with other trial cited

Widely reported allegations that prominent Houston attorney John M. O'Quinn was involved in jury tampering in a $107 million federal lawsuit appear untrue, many figures involved with that lawsuit agreed Thursday.

The allegations, and a purported investigation of them by the FBI, were described in March by several Texas publications, including The Houston Post. The allegations concerned a federal lawsuit in Galveston that resulted in a $107 million jury verdict against the Monsanto Co.

It was reported that FBI agents questioned jurors who returned the verdict to determine if attorneys tampered with or bribed the jury panel.

One of the jurors said he told agents he was never approached by attorneys in the case, and did not know that any other juror had been approached. . . .

Related to Alexander's investigation of O'Quinn is a state bar disciplinary action lawsuit filed Wednesday against Benton Musslewhite, a Houston attorney.

Alexander was appointed by the bar to investigate allegations of wrongdoing by O'Quinn, Musslewhite and attorney Newton B. Schwartz.

Wednesday's suit alleges Musslewhite and O'Quinn engaged seven people to solicit clients for their law practices, a violation of bar rules.

The suit also claims O'Quinn financed Musslewhite's practice in exchange for a percentage of client fees on some cases, without the consent of the clients and without O'Quinn's taking any responsibility for the cases.

Musslewhite said those charges are false. He acknowledged that O'Quinn has financed some of cases for him, but always has either worked or been expected to help out on those cases.

APPENDIX I-14

(Excerpts from)

The Houston Post
May 23, 1987

Probe of Houston lawyers draws sharp criticism

Charges of 'runaway prosecutor' and 'vigilante' tactics follow investigation

By Fred Bonavita
and John Mecklin

AUSTIN - An investigation of three Houston lawyers in connection with alleged soliciting of clients has been sharply criticized for "vigilante" tactics and for being in the hands of a "runaway prosecutor," The Houston Post has learned.

In remarks to the executive committee of the State Bar of Texas Thursday, Justice Franklin Spears of the Texas Supreme Court said he was "raising the caution flag" over the handling of the probe by a Houston

grievance committee of the State Bar of Texas, including the use of a special prosecutor and investigator in the case.

Jerry Lastelik of Dallas, chairman of the executive committee, charged the investigation was being handled by a "runaway prosecutor" who was employed by the Houston grievance committee and not by the state bar.

Bill Whitehurst of Austin, out-going president of the state bar, agreed with Lastelik's characterization of the prosecutor and added that the decision by the Houston grievance committee to solicit private funds to pay for an investigation gives the appearance that "vigilante groups are financing the investigation."

But Larry Doherty of Houston, chairman of the District 4C Grievance Committee, reacted indignantly to the

bar officials' statements and countered that they are trying to "stymie" the local probe of alleged wrongdoing by the three Houston lawyers.

"This stinks!" Doherty said of the comments at the executive committee meeting. "This whole (expletive) thing stinks!"

Tom Alexander, the special prosecutor hired to investigate the three attorneys, said Friday the criticism from Austin "kind of rankles" him. . . .

The Supreme Court, which approves state bar expenses, earlier this month refused to authorize paying Alexander up to $200,000 to act as a special counsel in the case. The court, in an 8-0 ruling not signed by Chief Justice John L. Hill, said there was no reason the state bar's general counsel could not handle the prosecution but that

Alexander could serve without pay, if he wanted.

Alexander was asked by the Houston grievance panel to look into allegations of wrongdoing against Houston attorneys Benton Musslewhite, John O'Quinn and Newton Schwartz. Alexander hired Investigator Clyde Wilson to probe the charges.

Since then, the inquiry has gained widespread publicity, spinning off allegations concerning eight other attorneys and two state district judges from Houston. Those allegations have been referred to the Harris County district attorney's office and the state bar.

One of judges, Family Court Judge Allen Daggett, already has criticized Wilson, asking "who appointed Mr. Wilson to be watchdog of the bar?" Wilson and Daggett are scheduled to

meet next week over their differences.

Doherty confirmed Friday that his grievance committee, by an 11-0 vote, decided Wednesday night to authorize Alexander to open a special bank account and solicit private contributions to pay Wilson's fees. Doherty called the move a "vote of confidence in Tom Alexander."

In his comments to the executive committee, Spears said, "I'm only raising the caution flag to tell you that this thing can get sticky and it can get messy, and it can involve pitting the court against the bar. If that's what you want, that's it."

He pointed to recent newspaper accounts of comments by Alexander concerning the investigation and told the bar officials: "I get the feeling that Tom Alexander has taken over-that he's going to do what he wants to

do, regardless of what's right or what the bar wants done or anybody else."

The judge said the court was "getting pressure" from both sides in the case and said he does not want it to "blow up."

Lastelik told the judge the state bar has no control over the situation since it had not hired Alexander or Wilson. Lastelik said many people in Houston view Alexander as "a runaway prosecutor."

Agreed Whitehurst: "We do have a runaway prosecutor down in Houston who is holding press conferences and . . . is trying this case in the papers in the name of the State Bar of Texas."

He suggested Laselik meet with Doherty and Alexander and suggest the press conferences stop.

On the issue of press coverage, Alexander said, "Certainly, it's no

solution to the bar's problems that we keep the bar's problems in secrecy."

He added, "The way I feel about that is the judges and lawyers ought to be subject to the scrutiny of the press. I've only answered the questions the press has asked me. An active, investigative press is the strongest deterrence I know to misconduct by anybody.

Whitehurst went on to tell the board: "The other matter that's coming up - and get ready - is this Clyde Wilson matter. That's getting totally out of hand."

Pointing to the local grievance committee's decision to solicit funds to pay Wilson's fees, Whitehurst said: "It's going to come out - or the appearance will be - that vigilante groups are financing the investigation of lawyers for the grievance process."

But Wilson said the decision to allow private financing of the investigation came about only after the Supreme Court cut off funding from the state bar.

He said it appeared to him the Supreme Court's decision to cut off funding was an attempt to silence the investigation. "Well, we're not that easy to shut up," Wilson said.

"If they think they're going to exert any influence on me, or cover anything up, they're sure barking at the wrong dog," Wilson said. . . .

Wilson said this week's comments from Austin only made him more determined to continue the investigation and he intends to talk to the press at his own pleasure. "No, I'll talk to them (reporters) whenever I damn well feel like it. I think the people of Harris County are entitled to

know who the bad apples are."

Doherty charged the hierarchy of the state bar has done its best to thwart the local probe of the three lawyers, including firing the first lawyer and investigator hired to probe them.

He singled out Steve Peterson, general counsel of the state bar, for specific criticism. Peterson's office, declined comment.

"Somebody is trying to cover up for some lawyers who have money enough," an irate Doherty said.

"If I want these people in Austin interfering with our investigation, I'll ask for it!"

Doherty said it was only because his grievance committee "reached out and sought outside counsel and an outside investigator" that it has been able to proceed as far as it has with the probe.

"They need to leave us alone!" Doherty said.

APPENDIX I-15
(Excerpts from)
Texas Lawyer
June 1, 1987

Probe Draws Officials' Ire

By Mark Obbie
and Robert Elder Jr.

Denounced by State Bar officials and a Supreme Court justice as a "runaway prosecutor," a probe of Houston lawyers and judges has come under increasing fire from several quarters.

But supporters of the controversial investigation have responded with charges of their own, claiming some State Bar leaders fail "the smell test" by seeking to cripple the inquiry rather than tackling a significant and sensitive disciplinary problem.

Among recent developments in a group of related cases:

Bar leaders lashed out at the conduct of special prosecutor Tom Alexander and private investigator

Clyde Wilson, accusing them of overstepping bounds set by Bar rules and by the two grievance committees requesting their help.

Supreme Court Justice Franklin Spears, in what he later acknowledged was a "subliminal message" to the Bar that it ought to dump Alexander and rely solely on the general counsel, dredged up a 24-year-old appellate opinion in which Alexander was criticized for injecting prejudicial statements into a jury trial record.

Alexander and the Bar's first assistant general counsel, Stephen M. Smoot, filed a new disciplinary suit May 27 against Houston trial lawyer Benton Musslewhite for allegedly soliciting personal injury clients. Musslewhite denied the charges. The judge to whom the case was assigned randomly, 151st District Judge Alice

Trevathan, is married to attorney Richard Trevathan, who represents two men implicated in Alexander's probe.

. . .

The investigation into solicitation of personal injury cases, originally dubbed the "masters of disasters" investigation, first resulted in disciplinary suits against three Houston lawyers: John O'Quinn, Benton Musslewhite and Newton Schwartz.

Those suits, filed by the Bar's general counsel between October and February, were turned over to Alexander by the two grievance committees that voted in favor of the litigation.

Since Alexander and Wilson got involved in February, they have uncovered what they say is evidence of unethical or illegal behavior by at least eight other lawyers, including

evidence of extensive, systematic ambulance-chasing schemes. . . .

At the open meeting, a tape recording of which was played later for reporters, State Bar president Bill Whitehurst and Spears blasted Alexander and Wilson for investigating more than they were asked to do, for their comments to reporters and for contemplating a private funding arrangement for Wilson's fee.

"I'm only raising the caution flag to tell you that his thing can get sticky; it would get messy," Spears warned of Alexander's public comments about pending cases, adding that Alexander's probe has gone far beyond its original scope of disciplinary cases against three lawyers.

"I get the feeling that Tom Alexander's taking over {this investigation} and he's going to do

what he wants to do regardless of what's right or what the Bar wants to be done," Spears said. "I'm getting pressure from both sides on this. . . . I am literally in the middle of this thing. . . . You've got a runaway prosecutor down there trying cases in the press."

Whitehurst agreed with the "runaway prosecutor" characterization and cautioned further that a plan to pay Wilson from private donations - to replace the Bar funds initially approved by the board and then vetoed by the Supreme Court - is "fraught with all kinds of appearance problems."

"There's going to be the appearance of vigilante groups financing investigations of lawyers for the grievance process," Whitehurst said.

. . .

"I think they stink," Wilson said. "I'm beginning to question if this is not one of the biggest coverups I've ever seen."

Two judges have been named as subjects of criminal probes sparked by Wilson's work. But, despite the general belief that they are spin-offs from the Bar probe, their cases' links to the original Bar investigation are tenuous at best.

. . .

But Marian Rosen, who said she was acting on Daggett's behalf as a friend and not as an attorney, told reporters "this whole thing has gotten out of hand."

"I understand nobody has retained Mr. Wilson at all," Rosen said, calling Wilson and his probe "a self-styled investigator or inquisition" of judges.

As to Justice Spears' suggestion

that Alexander is unfit to perform as a special prosecutor of the Bar, the justice told board members at the May 21 meeting to "jot down a citation." He revealed no more about the case at the time, but acknowledged later than an attorney reminded him of the 1963 San Antonio Court of Appeals decision that was highly critical of Alexander.

Alexander admitted he "said some things in the case that I shouldn't have said," and called the case a "severe dog-fight." But he questioned what relevance the case could have more than 24 years later.

In that decision, penned by Judge Jack Pope, later a Supreme Court justice, Alexander was chastised for riddling the record of a personal injury trial with prejudicial statements with a strategy that

"violates professional standards and counsel's duty to the court."

APPENDIX I-16

(Excerpts from)

The Houston Post
October 21, 1987

Ex-associates say O'Quinn paid solicitors

'Runners' brought Houston lawyer work, they claim

By John Mecklin

Former associates of prominent Houston attorney John M. O'Quinn contend he routinely paid "runners" thousands of dollars to solicit legal work for him, according to sworn affidavits.

One affidavit claimed O'Quinn, known for high-dollar settlements and successes in personal injury cases, attempted to set up an organization to solicit legal cases from the families of 248 American soldiers killed in a December 1985 air crash in Gander,

Newfoundland. . . .

O'Quinn also has appealed trial court rulings in the disciplinary action to the First Court of Appeals. Further trial court action has been stayed pending disposition of the latter appeal.

Tom Alexander, a special prosecutor handling disciplinary actions against O'Quinn and attorneys Benton Musslewhite and Newton B. Schwartz, said he filed the sworn affidavits along with his response to the Supreme Court "to show what the conduct has been and that it is continuing. . . .

David Berg, one of several attorneys defending O'Quinn in the disciplinary suit, said a gag order prevented him from commenting. But Berg did say, "Other allegations (against O'Quinn) in the past have proved false, and you have to go a long way to find a client

who would complain against John O'Quinn."

Berg apparently was referring to published allegations that O'Quinn had been involved in jury tampering in a $107 million federal lawsuit. Those allegations later were found to be false. . . .

In another affidavit, Mary L. Market, a former legal secretary for O'Quinn, contended the cases that runners solicited for O'Quinn were "too numerous to recall," although she felt she could document some of them from records.

She said O'Quinn told her to ask runners to send invoices for "investigative fees" to the law firm.

. . .

APPENDIX I-17

(Excerpts from)

The Texas Lawyer
November 2, 1987

Bar dumps Alexander

Dissenters Say O'Quinn Case Doomed Without Prosecutor

By Robert Elder Jr.

After nearly a year of acrimonious debate, the State Bar board of directors has dismissed the special prosecutor in the Bar's suits against three Houston plaintiffs' lawyers.

Board members said their Oct. 23 vote was intended to get the pivotal case against John O'Quinn off dead center, in view of the stay that has blocked O'Quinn's disbarment trial because of a challenge to the legal status of Bar special prosecutor Tom Alexander. . . .

Leaving the case to the Bar's

general counsel, they argued, may bring the Bar to a humiliating courtroom defeat at the hands of O'Quinn's five-man team of top Texas litigators.

Although most Bar officials said it was nothing personal against Alexander, several board members who gave accounts of the Bar directors' 90-minute closed-door debate at the meeting in Bryan said the decision to dump Alexander stemmed in part from his high-profile barratry investigation into solicitation of personal injury plaintiffs. . . .

Although the 1st Court of Appeals in Houston did not indicate the reason for its stay, board members said removing the issue of special prosecutor would get the case moving again.

Normally outspoken board members closed ranks after the meeting as the board tried to put the controversy over

Alexander behind it.

Even Alexander, whose investigation expanded beyond the original three targets to become the most notorious in the Bar's history, said his work is done and the Bar's office of general counsel can handle the so-called "Houston solicitation cases."

. . .

Alexander said he has turned over the results of the investigation he and Wilson conducted to the state's unauthorized practice of law committee, an arm of the Supreme Court, the appropriate Bar grievance committees and the Harris County district attorney's office.

The final tally: "about 12 individuals involved," Alexander said.

. . .

The Supreme Court on May 5 denied a Bar request to pay Alexander up to

$200,000 for his work. In the court order, Justice Franklin Spears said the newly expanded general counsel's office could handle the investigation and that there was no reason to alter the "long-outstanding policy" of not paying outside counsel for disciplinary matters.

Alexander had agreed to work for nothing.

The disbarment suit against O'Quinn hit a roadblock Sept. 4 when the 1st Court of Appeals temporarily stayed all trial court proceedings in the 189th District court of Judge Richard Millard until it ruled on whether Alexander could continue as special prosecutor.

O'Quinn's attorneys had challenged Alexander's status as special prosecutor, saying only the Supreme Court can appoint such a position. But the appeals court did not cite that or

any specific reason for its stay order.

Board member Thomas Conner of Houston said the dismissal was necessary because "thespecial prosecutor has become the central issue instead of the prosecution of those Houston cases."

"It had come to a complete halt," Conner said.

. . .

The resentment over Alexander tactics first publicly surfaced at a executive committee meeting May when then-president Bill Whitehurst and Justice Spears ripped into Alexander for investigating more than he was asked to do and for speaking freely to reporters.

Spears said Alexander was a "runaway prosecutor . . . trying cases in the press."

Board members said the closed-door

debate made it clear that some members still resented Alexander's personal style and felt that Alexander was not responsible to the executive committee by talking freely about the case and going outside the scope of the original investigation. . . .

Board members who described the executive session also said Bar general counsel Steven Peterson "swore up and down," as one member put it, that his office could win the Bar's case against O'Quinn.

When asked directly by one member whether he had opposed the appointment of Alexander from the start, Peterson said yes, the members said.

During a July pre-trial hearing in the Houston trial court, Doherty testified about a proposed Bar settlement offer to O'Quinn. Although Doherty and general counsel Peterson

disagreed over who broached the offer to O'Quinn's attorneys, the offer apparently was a public reprimand and an agreement to testify for 18 months in any suit against Musslewhite and another, unnamed lawyer.

Peterson said there was some talk among Bar officials of "a more limited punishment" for O'Quinn but that was before the Clyde Wilson investigation was completed."

Also unresolved is the role of Attorney General Jim Mattox, who filed a brief with the 1st Court of Appeals Sept. 25 arguing that the State Bar's appointment of a special prosecutor violates the law and the Texas Constitution because the AG is the exclusive representative of state agencies in civil litigation. . . .

Alexander also was removed from the disciplinary suits against Musslewhite

and Schwartz. Both defendants face a scheduled Nov. 9 trial in Houston before visiting Judge Solomon Cass of San Antonio.

Schwartz is charged with four counts of misconduct, including improper withholding money from a settlement and charging excessive interest on loan to client.

Musslewhite has not accepted a settlement offer from the Bar that calls for one year's probation and three years' suspension. Schwartz, who is represented by Edward Murr, name partner at Wright & Payton, said Oct. 26 the Bar has not offered him a settlement.

Musslewhite said Oct. 28 he will file the same motions as O'Quinn, asking Judge Casseb to stay the trial pending Supreme Court ruling on the constitutionality of the State Bar

rules. O'Quinn has argued to the Supreme Court that the Bar's rules banning solicitation as an infringement of commercial from speech rights. Millard, the trial judge hearing O'quinn's cases, had rejected those arguments as well as the challenge to Alexander's status and had set O'Quinn's trial for Oct. 19 before the stay was entered.

Musslewhite said he will have a lawyer lined up before pre-trial hearings.

Schwartz, Musslewhite and O'Quinn were among the nine lawyers who negotiated a $180 million settlement in Agent Orange case in May 1984.

APPENDIX I-18

(Excerpts from)

The Texas Lawyer
February 8, 1989

Musslewhite Agrees To License Suspension

By Richard Connelly

Houston solo practitioner Benton Musslewhite agreed Feb. 1 to a 90-day suspension of his law license and three years' probation in connection with a variety of charges of professional misconduct, but he refused to admit any wrongdoing.

The agreement "is not an admission of guilt on the part of Benton Musslewhite - it's a compromise," said Musslewhite's lawyer, solo practitioner Ray Bass of Austin. "It's simply a way to bury the hatchet with the State Bar and allow him to get on with his business. . . .

Musslewhite appeared at a press conference called by Bass, but Bass advised him to refuse to answer questions on the merits of the case. Musslewhite, a prominent personal injury lawyer who is involved in suits over Agent Orange and the Bhopal chemical leak, did say the Bar's suit had "a devastating impact" on his practice.

"I know of cases I've lost because of it," he said. He added that he settled the case partly because of family considerations and an "unusually trying year coming up from the standpoint of scheduling {court appearances for clients}. . . As I told my attorney, I don't see how I could do both - fight the Bar and do the job I need to do on those {other} cases."

The agreement calls for the 90-day suspension to begin Nov. 1, although

Casseb could delay it until Aug. 1, 1989, if Musslewhite's caseload requires it, Bass said.

Steven Smoot, first assistant, general counsel for the Bar, signed the agreement but said Bar officials would not comment further. Tom Alexander, name partner at Alexander & McEvily and former special prosecutor for the Bar in the Musslewhite case, said he had proposed a one-year suspension instead of 90 days.

"I think one year would be more appropriate, but I can't criticize what's been done," he said.

The agreement includes a review of all of Musslewhite's current cases by Harley Hampton, name partner at Houston's Young & Hampton.

Hampton will decide if any current clients were gathered by improper solicitation, in which case Musslewhite

will forfeit any legal fees from that client. . . .

The agreement disposes of all charges against Musslewhite, including improper solicitation of clients, fee-sharing, ignoring cases and failing to return client phone calls. Musslewhite's cases are to be reviewed by an attorney who will decide if any clients were improperly solicited.

Musslewhite's settlement may open the way to settlement talks with Houston attorney John O'Quinn, who also is charged with improper solicitation. Although the O'Quinn case is the subject of a gag order, sources familiar with the case say they believed the Bar wanted to get the Musslewhite case out of the way before beginning serious talks with O'Quinn.

O'Quinn's high-priced defense team mounted a challenge to the

constitutionally of the Bar rules banning solicitation, and a similar move by Musslewhite may have played a part in the settlement talks, court documents showed. . . .

APPENDIX I-19

(Excerpts from)

The Houston Post
June 1988

2nd Agent Orange suit aims at improving relief

By Kathy Kiely

WASHINGTON - Houston attorney Benton Musslewhite, who has been active in the legal battle against manufacturers of Agent Orange, is making another attempt to win compensation for Vietnam veterans and their families who say they have been injured by the defoliant.

"I'm going after someone for wrongdoing my family," Kathryn Hartman, wife of Houston cancer victim Ronald Hartman, said of a lawsuit in her husband's behalf that Musslewhite announced Thursday at a Washington press conference.

Musslewhite represented 2,000

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Vietnam veterans in an earlier Agent Orange case that resulted in a $180 million settlement.

He appeared undaunted by a Texas State Bar order, filed in an unrelated matter, that will force him to take a three-month hiatus from his law practice.

Hartman said he believes the lymphoma for which he is being treated with chemotherapy and the birth defects of his two children were caused by his exposure to Agent Orange during a tour of duty in Vietnam. . . .

Filing the new, class-action suit on Hartman's behalf will provide another avenue to improve the relief package for all veterans and the families of veterans affected by Agent Orange-related ailments, Musslewhite said.

"We're going to fight these chemical companies and the government in every

valley and hill until we get our day in court," he said.

Musslewhite, who like many advocates for Vietnam veterans believes the Agent Orange settlement is too small to accommodate the veterans and children believed to have suffered cancers and birth defects from exposure, had appealed his earlier case to the U.S. Supreme Court. . . .

In the meantime, Musslewhite said he believes he has good legal grounds to bring a new on behalf of veterans who did not manifest any signs of disease until after May 1, 1984. Musslewhite argues that they are not covered by the earlier judgment. . . .

Musslewhite wants to avoid U.S. District Judge Jack Weinstein, the Brooklyn jurist who is trying all the federal Agent Orange cases.

"I don't have to tell you what would happen if this case came to his desk," Musslewhite said.

He said he is likely to have a better shot of winning in Beaumont.

. . .

Musslewhite said he will be able to pursue this latest Agent Orange case despite an order from the state Bar of Texas placing him under three-year probation and giving him a 90-day suspension from his law practice.

APPENDIX I-20

(Excerpts from)

The Scotsman
July 16, 1988

Piper Alpha families advised to file claims in US courts

Punitive damages urged

By David Stewart

An American lawyer argued in Aberdeen yesterday that the families of victims of the Piper Alpha disaster should seek punitive damages in the state courts of Texas.

Mr. Benton Musslewhite, whose firm is based in Houston, said he believed that such courts would hear damages claims and talked of awards of up to $25 million (15 million pounds).

"The crucial thing to me, after our preliminary investigation, is that there is a need once and for all to impose punitive damages on these corporations in the North Sea and to

send a message: 'You better get safe.'

"The only thing they understand is the pocketbook. If substantial enough punitive damages are imposed on these corporations, they will have to say: 'We can't afford not to be safe. We have to get safe or we will be put out of business.' Then they will be safe, and only then.'

Mr. Musslewhite, who said he had come to Scotland after speaking to lawyers here by telephone, said he had considerable experience dealing with claims arising from North Sea accidents. He denied being an "ambulance-chaser".

He added: "I would stress that my team will not accept any cases except through Scottish or UK-based solicitors." . . .

Mr. Musslewhite insisted: "We are not the Bhopal brigade". Asked about

the possible level of settlements in Texas, he said that damages might be from $1 million to $5 million, depending on individual circumstances. But if gross negligence was proved then the jury could also award punitive damages of up to four times the original figure.

Mr. Musslewhite said that in a previous action after an accident at Great Yarmouth, his company achieved a settlement of $3 million for a client, compared with an offer of 50,000 pounds made on behalf of the company.

Questioned about his firm's percentage cut in such actions, he said that it would be fewer than 30 per cent and probably more than 10 per cent.

Texas state courts, he added, were open to foreign as well as domestic plaintiffs and litigation pursued

through state rather than federal courts was usually more successful.

The jurisdictional complexities and favorable punitive damages law make Texas the best place for suit to be filed by victims or victims' families of this tragedy," he said.

A spokeswoman for the Law Society of Scotland said that she could not comment on a particular firm, but if lawyers here decided that actions should be raised in the US, they would require someone in the US to act with them. . . .

. . .

APPENDIX I-21

(Excerpts from)

U.S. lawyer denies Texas barred him practicing

An American lawyer Mr. Ben Musslewhite - who last week promised to fight for huge damages for families of Piper Alpha victims - yesterday denied Press reports that he had been barred by the Texas legal authorities from practicing law. . . .

Mr. Smoot (of the Texas State Bar) said yesterday he would be filing a motion with the court this week to revoke Mr. Musslewhite's probation. If the motion is successful Mr. Musslewhite would be effectively barred from practicing law for two years.

Mr. Smoot pointed out that under the terms of the action, Mr. Musslewhite was not allowed to take on any new

clients either individually or as a member of a team.

He can still continue to refer clients to other lawyers but, having done so, must not then associate himself with the lawyers, said Mr. Smoot.

Mr. Smoot agreed that Mr. Musslewhite's arrival in Aberdeen last week prompted him to prepare the filing of the motion, as he believed he would be involved in representing new clients. . . .

"His name gets into the Press a lot," said Mr. Smoot. "He has traditionally been involved in handling personal injury cases." . . .

"In the US the bar is much more adversarial. It is not uncommon for them to shoot at a high-profile lawyer like myself," Musslewhite said.

"I don't know why they do this. It

could be greed or professional jealousy. I will let all of you draw your own conclusions."

"If I start replying to what they are saying now, all we will be doing is hurting the victims more and damaging the US legal profession. There has been enough damage done already."

"I thought we were here to try to do something to help the victims of the Piper Alpha. Solicitors in Scotland want my advice about various aspects of the law and these are matters which I think are important and should be discussed."

Mr. Musslewhite said he was considering "legal remedies" against at least one Sunday newspaper who he claimed had carried inaccurate reports about the disciplinary action.

"I think it is a disgrace for this kind of thing to be fought out in the

Press. You know, Occidental and McDermott are laughing into their beer about how these lawyers are fighting each other."

Mr. Musslewhite is due back in Aberdeen later this week.

APPENDIX I-22

The Houston Post
July 18, 1989

Statef Bar president to probe Houston attorney's conduct

Lawyer on disciplinary probation currently in Scotland discussing Piper Alpha case

Lawyer on disciplinary probation currently in Scotland discussing Piper Alpha case

By Bill Hensel Jr.
The Houston Post

The president of the State Bar of Texas said Sunday that Houston lawyer Benton Musslewhite will be investigated for possibly violating terms of his disciplinary probation with the bar.

Musslewhite, 56, has been in Scotland discussing potential lawsuits over the Piper Alpha oil platform rig explosion July 6.

"I am concerned about it and most certainly will look into the matter,"

said attorney James Sales of Houston, president of the state bar. . . .

Another lawyer who is overseeing Musslewhite's practice for the state bar said he, too, will look into Musslewhite's activities in Scotland.

Musslewhite earlier this year agreed to settle a lawsuit the bar filed against him alleging professional misconduct.

The settlement included his being placed on disciplinary probation for three years. . . .

Among the charges made in the bar's lawsuit was that Musslewhite had solicited lawsuits.

Musslewhite held a news conference Friday in Aberdeen to say he would attempt to have lawsuits stemming from the oil platform disaster heard in Texas courts. Musslewhite maintains Texas juries are more inclined to give

higher awards in personal injury cases.

He told Reuters over the weekend he was in Glasgow to meet with solicitors who invited him to work on the case. He declined to name the firms.

Houston lawyer Hartley, Hampton, who is monitoring Musslewhite's practice under terms of the settlement agreement, said he is launching his own investigation.

"I can't figure out what he is doing," Hampton said Sunday. "He cannot accept new cases, period. Even if he is meeting with solicitors, he can't do that under the order.

Reports of Musslewhite's actions are "disturbing," Hampton said.

Hampton said after he completes his investigation, he will report to state District Judge Solomon Casseb Jr., who siigned the settlement agreement

between the bar and Musslewhite.

Under the terms of the agrement, Musslewhite will be suspended from practice for a three-month period starting Nov. 1. That period can be delayed until August 1989 at Casseb's discretion.

Musslewhite lashed out Saturday at stories in Scottish newspapers that he was contacting families looking for business.

He told Reuters that, because of the way he has designed his practice, his suspension will not interfere with any cases he has been handling.

He did not say whether he personally would handle suits brought by survivors or relatives of the 166 men killed when the North Sea oil platform was engulfed by flames.

Musslewhite told Reuters he believes he could have won the Texas bar's cases

against him but agreed to the settlement so he could get one with his law practice.

The attorney, who had been facing possible disbarment in the disciplinary suit, is best known for his role representing Vietnam veterans in Agent Orange lawsuits against chemical manufacturers.

APPENDIX I-23

(Excerpts from)

Belfast Newsletter
July 19, 1988

Texas lawyer calls foul

An American lawyer who claimed he can win $1 billion damages for the families of Piper Alpha victims denied reports that he had been barred in the United States for professional misconduct.

Benton Musslewhite of Houston, Texas, yesterday described the report as rubbish.

. . .

He was "incensed" by a report in a Sunday newspaper, headlined "Barred lawyer courts Piper Alpha families".

"I am considering legal remedies. I am not barred from practicing law, and I am not courting the families.

"I have said publicly I would have no contact with them. I am working

through solicitors in Scotland," he said.

The newspaper claim that he was "suspended on probation for three years and barred from taking on any new clients" was false.

Mr. Musslewhite said the grievance committee of the Texas State Bar Authority had put him on probation for three years and imposed a 90-day suspension.

"It was an agreed judgment. There was no trial, no jury found me guilty of any specific act of misconduct."

He could continue to practice law, but could not take on new clients unless he referred them to another lawyer.

"It's correct to speak of them trying to put a spoke in my wheels. It could be professional jealousy. Whatever it is I am not going to lower

myself to the level of a battle of personalities."

He said he had won multi-million dollar damages against big insurance companies and corporations in the United States.

And he said the bar associations, which were packed with their lawyers, had been gunning for him for years.

He admitted that when he was put on probation he was deeply involved in fighting for Vietnam veterans who had suffered as a result of the use of the defoliant Agent Orange.

"It frankly meant that other cases were not proceeded with as fast as I would have liked.

"It doesn't have one bit of relevance to the Piper Alpha tragedy."

Mr. Musslewhite said he had discovered that an American law firm sent a copy of the judgment against him

to Scottish solicitors who passed it on to the Press.

"I think it's a disgrace for this kind of thing to be fought out in the Press. You know Occidental and McDermott are laughing into their beer about how these lawyers are fighting each other."

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Extract from
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Benton Musslewhite of Huston, Texas, yesterday described the report as rubbish.

He put it down to "professional jealousy" and said it was an attempt by a rival American law firm to "put a spoke in my wheel".

Occidental, the rig owners, and McDermott who built the rig would be "laughing into their beer about how these lawyers are fighting each other", he said.

Earlier Mr Musslewhite said on a television programme that the victims' families could receive £15 million each in compensation and punitive damages.

He was "incensed" by a report in a Sunday newspaper, headlined "Barred lawyer courts Piper Alpha families".

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Stricken oil rig agony goes on

Three more bodies from the Piper Alpha tragedy have been recovered Grampian police said last night.

This leaves 137 men still unaccounted for.

The bodies of 29 have been recovered so far and all but the last three have been identified.

Meanwhile Occidental, the owner of the stricken platform, said Red Adair's team of troubleshooters boarded the rig yesterday morning.

They attached a hose to one of the five blazing well-heads and started to pump in sea water in an attempt to douse the fire.

This operation lasted several hours.

The next stage of capping the well is to pump drilling mud or cement into the well head to shut it off completely.

APPENDIX I-24

(Excerpts from)

Glasgow Herald
July 21, 1988

Rig claims put US courts to the test

By ROS DAVIDSON

THE widows and children of the Piper Alpha victims might face "serious problems" in securing compensation in US courts from the oil operators and designers.

Their claims against American multi-nationals could be thrown out because the victims were not US citizens, according to Professor David Robertson, an authority on compensation and maritime law at the University of Texas.

. . .

Yet New York lawyer Stuart Speiser is confident that the cases could be brought in Texas or Louisiana and

settled within two years. In the US Mr. Speiser represents most of the families of the 45 men killed in the 1986 Chinook helicopter crash.

He disagrees with concerns that Piper Alpha's suits could be thrown out by emphasising that foreign oil rig victims have won in state courts on two occasions. Mr. Speiser handled both cases. He filed law suits in Texas and Louisiana for families of the 84 then killed when the Ocean Ranger rig capsized near Newfoundland in 1982. Some of the victims were British.

In the second disaster, he won settlements in under two years for relatives of the 81 killed when the Glomar Java Sea capsized in the South China sea in 1983. *

Piper Alpha litigation would be expensive, Texas maritime lawyer Robert Chaffin warns that both sides' fees

could exceed $1m in the state courts. But he says the award could top $1bn because punitive damages are influenced by the profitability of the companies sued. He also defends American lawyers' high contingency fees by noting that he once secured a settlement for the family of a man killed in the North Sea in the 1970s that was 15 times higher than the company offer. He concludes: "Cases should be brought where the widows and children can get the most money."

Comment By Petitioner:

*Speiser was not himself involved in either one of these cases; his partner, Krause was. However, Musslewhite was on the plaintiffs' committee with Krause in the Ocean Ranger litigation and stayed with the non-settling plaintiffs, while Krause bailed out with the settling plaintiffs. Musslewhite later secured substantially

larger settlements for those who stayed with the case. As to the Global Java Sea, O'Quinn was lead counsel and the one who was primarily responsible for the settlement of that case. Apparently, Speiser for some reason resented Musslewhite and O'Quinn, because it was he who sent Musslewhite's probation judgment to the Scottish press).

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Extract from
Glasgow Herald

21 JUL 1988

Rig claims put US courts to the test

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Their claims against American multi-nationals could be thrown out because the victims were not US citizens, according to Professor David Robertson, an authority on compensation and maritime law at the University of Texas.

The outlook for Piper Alpha claims is better than for some other recent disasters, but Professor Robertson predicts that pertinent US law is too uncertain to say the odds for success would be particularly high. The potential size of the case might even force the US Supreme Court, the country's highest, to rule on the matter.

The compensation issue has become increasingly emotional for the relatives of the 166 victims. A number of American lawyers have visited Aberdeen in the three weeks since the rig exploded, one with a record of professional misconduct in Texas. And the Law Society of Scotland has publicly cautioned the families since US contingency fees are typically 33% to 40% of any award.

Yet Piper Alpha may become one of the biggest tort law suits in history. Even respected American lawyers suggest that compensation and punitive damages could reach $1bn in the US, where the legal system juries return notoriously high awards.

Lawyers say claims should be filed in Texas or neighbouring Louisiana because their "populist" state laws favour disaster victims. America's federal courts have routinely refused to hear cases brought by foreigners, as in India's Bhopal disaster, and would probably return most Piper Alpha suits to the Scottish and English courts. The state strategy appears feasible, because the rig operator, Occidental Petroleum, two of its partners, and the designers of both the platform and the topside do much of their business in such oil-producing states.

But Professor Robertson, who has written on jurisdiction for the University of Oxford's Law Quarterly Review, recommends caution. He believes that although current doctrine suggests Piper Alpha would be a state issue, the interaction between the two tiers of the US legal system in such offshore disasters is complex and increasingly unstable. He also says that Piper Alpha might not seem to be a question of maritime — and therefore federal — law because it is a fixed platform. Arguments to the contrary, however, are "plausible."

Because of the money potentially involved, Piper Alpha could be the case that prompts the US Supreme Court to rethink compensation for foreign disaster victims, Professor Robertson suggests. Today's high court is conservative and pragmatic. He concludes: "Most of the injured are not US citizens so there are serious jurisdictional problems."

Yet New York lawyer Stuart Speiser is confident that the cases could be brought in Texas or Louisiana and settled within two years. In the US Mr Speiser represents most of the families of the 45 men killed in the 1986 Chinook helicopter crash.

He disgrees with concerns that Piper Alpha's suits could be thrown out by emphasising that foreign oil rig victims have won in state courts on two occasions. Mr Speiser handled both cases. He filed law suits in Texas and Louisiana for families of the 84 men killed when the Ocean Ranger rig capsized near Newfoundland in 1982. Some of the victims were British.

In the second disaster, he won settlements in under two years for relatives of the 81 killed when the Glomar Java Sea capsized in the South China sea in 1983.

Piper Alpha litigation would be expensive. Texas maritime lawyer Robert Chaffin warns that both sides' fees could exceed $1m in the state courts. But he says the award could top $1bn because punitive damages are influenced by the profitability of the companies sued. He also defends American lawyers' high contingency fees by noting that he once secured a settlement for the family of a man killed in the North Sea in the 1970s that was 15 times higher than the company offer. He concludes: "Cases should be brought where the widows and children can get the most money."

APPENDIX I-24

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APPENDIX I-25

(Excerpts from)

THE TEXAS LAWYER
August 1, 1988

Two Disasters Spawn Barratry Allegations

Bar Sends Investigators
to Scotland, Brownville

BY ROBERT ELDER JR.

Prompted by reports of lawyers improperly soliciting clients in the immediate aftermath of two recent disasters, the State Bar has sent an investigator to Brownsville and plans to dispatch its general counsel to Scotland in mid-August.

. . .

And general counsel Steven Peterson will travel to Scotland to investigate the role of Benton Musslewhite and other Houston lawyers in lining up

clients from the Piper Alpha oil rig disaster, Sales said July 27.

Although neither the Bar nor Musslewhite's court-appointed overseer has talked with Musslewhite about his activities in Scotland, the Bar has been granted a Sept. 19 hearing in 270th District court in Houston to discuss Musslewhite's activities.

The hearing, ordered by visiting state District Judge Solomon Casseb Jr., was requested by the Bar and Houston lawyer Hartley Hampton. Casseb appointed Hampton, name partner in Young & Hampton, to oversee Musslewhite's compliance with the three-month suspension of his law license - to begin Nov. 1 - and three year's probation.

Musslewhite agreed to the settlement Feb. 1 in a disciplinary suit stemming from previous allegations

of improper solicitation of clients, Musslewhite admitted no wrongdoing when he settled the case.

Sales said the Bar would investigate reports from Scotland lawyers and news media that there was a "ring" of Houston-area lawyers soliciting clients from the July 6 oil rig explosion, which left 167 dead.

"There is a suggestion that more lawyers from Houston are involved than there appeared to be at first blush," Sales said July 22.

Sales said information he received from Scottish lawyers shows that the same group of lawyers allegedly soliciting Piper Alpha suits "seemingly has tentacles that may reach back to prior incidents in the U.K. North Sea area." . . .

. . .

Sales, immediately after the

Bar's executive committee meeting on South Padre Island July 22, said "time is of the essence" in the North Sea investigation. He said July 27 he would have preferred to send Peterson to Scotland the week of July 25, but the general counsel first must attend the American Bar Association's conference in Toronto before heading overseas.

Hampton said he planned to take Musslewhite's deposition and begin his own investigation, which will "overlap" with the Bar's.

Hampton said he had not had any contact with Musslewhite since news media reports of the Piper Alpha cases, although, he added, he had been on vacation, and missed telephone calls from Musslewhite.

Hampton said press reports from Scotland and England about Musslewhite are "most discouraging and troubling."

Wire service reports from Scotland said Musslewhite on July 15 announced he would try to have suits stemming from the oil rig explosion heard in Texas.

Depending on the evidence heard Sept. 19, Hampton said, either he or the Bar could move to have Musslewhite's license revoked.

Sales said that if news reports from Scotland prove to be true, then "in retrospect" the Bar's settlement with Musslewhite was "too lenient." Sales said he has ordered Peterson and first assistant general counsel Steven Smoot to "marshall all the evidence we can" for the Sept. 19 hearing.

If the evidence shows Musslewhite violated the terms of his suspension and probation, Sales said, you can bet your sweet bippy" the Bar will move to ask for punishment stronger than the

Bar's settlement agreement.

Under the terms of Judge Casseb's settlement order, Musslewhite cannot accept any new clients before the suspension starts Nov. 1.

. . .

APPENDIX I-26

(Excerpts from)

THE NATIONAL LAW JOURNAL
August 8, 1988

North Sea Visit Spurs Probe of Texas Lawyer

BY GARY TAYLOR
Special to The National Law Journal

HOUSTON - Alarmed by news reports from the scene of a North Sea disaster, the State Bar of Texas has requested an "unusual" hearing to determine if attorney Benton Musslewhite has violated the settlement terms of his disciplinary dispute.

At the Sept. 19 hearing, the bar intends to question Mr. Musslewhite about his activities in the aftermath of the July 6 Piper Alpha oil rig explosion that left 166 dead.

"It's an unusual proceeding," says Steven Smoot, the bar's first assistant general counsel. "I've never conducted

one before."

Technically a motion for an oral hearing, the procedure is filed as part of the bar's litigation against Mr. Musslewhite. That disciplinary action was settled in February, when Mr. Musslewhite agreed to a 90-day suspension of his law license.

Mr. Smoot says the Houston solo practitioner also agreed to accept no new employment by clients, but he can refer cases to other attorneys. Violation of the terms could mean a three-year suspension or even disbarment for the well-known litigator, who established his reputation representing Vietnam veterans in the Agent Orange cases.

Neither Mr.Musslewhite nor his attorney, Ray Bass, an Austin solo practitioner, could be reached for comment. Both attorneys have said they

believe the agreement allows Mr. Musslewhite to refer clients to other lawyers and then work with those lawyers on the cases. Mr. Musslewhite has been in Aberdeen, Scotland, according to the press reports that captured the state bar's attention.

Those reports described a July 15 news conference during which Mr. Musslewhite said he would try to have Piper Alpha lawsuits tried in Texas courts, where juries give higher awards. But he also told reporters that he had redesigned his practice so his suspension would not interfere with cases like these.

"We want to hear his explanation," says Mr. Smoot. "The judgment speaks for itself. It says he shall accept no new employment by clients. We want to know who is on his team of lawyers."

That team was described in Scottish

newspaper ads and in letters allegedly drafted by Mr. Musslewhite to attorneys there. Those letters boast about the creation of a team of attorneys experienced in handling cases from mass disasters.

At his press conference, Mr. Musslewhite told reporters he was meeting with Scottish solicitors to discuss the Piper Alpha litigation potential, which could total $1 billion worth of liability. He said he'd been invited to work on the cases by Glasgow attorneys. In subsequent newspaper interviews he "lashed out" at reports that he had been contacting families about possible cases.

Mr. Musslewhite first attracted the Texas bar's disciplinary attention when it launched an investigation into solicitation of lawsuits and the use of

runners - or non-lawyers - to enlist victims of disasters. He was one of several attorneys accused of the practice by the bar. (NLJ, 6-8-87.)

The bar says it also wants to question Mr. Musslewhite about a lawsuit filed by him June 23 in Beaumont for an Agent Orange victim. Mr. Musslewhite has said that the Beaumont suit does not involve new clients.

. . .

APPENDIX I-27

Texas Lawyer
September 26, 1988

(Excerpts from)
MUSSLEWHITE DEFENDS OVERSEAS WORK

Disciplined Lawyer Says He Planned Referrals To O'Quinn

By Richard Connelly

Houston attorney Benton Musslewhite, prevented from taking new cases because of previous unethical solicitation charges, told a district judge Sept. 20 that he and an associate went to Scotland after a July 6 oil rig disaster and hired a public relations representative, held a press conference, wrote to two dozen Scottish solicitors and sent a mass mailing to every victim or family involved in the explosion.

But Musslewhite, a prominent solo practitioner, told visiting Judge Solomon Casseb, Jr. that he did not

violate probation terms barring him since Feb. 1 from taking on new clients. Instead, he testified, he was planning to refer any cases to Houston attorney John O'Quinn, another big-name personal injury lawyer facing unethical solicitation charges.

"I told [O'Quinn], 'You know I can't accept cases, but would you accept referrals?' and he said he would," Musslewhite testified. Definite financial arrangements were not discussed, he said.

Musslewhite also stressed that, even with the press conference and mailings to victims, there was no direct solicitation of prospective clients. "I said at the press conference that we agreed that the victims should not directly hire American lawyers and we would only take cases through Scottish solicitors," he said.

Musslewhite, working with Houston

solo practitioner Kelly Newman, never did get any cases from the Piper Alpha disaster, which claimed 166 lives. But his actions have triggered a State Bar effort to revoke his probation, in a hearing scheduled to continue Oct. 17.

. . .

Musslewhite had been charged with unethical solicitation and ignoring clients. He said at the time of the agreement that he was not guilty but accepted the terms in order "to get on with [his] practice".

In addition to the Pipe Alpha activities, the Bar's petition cited a June 22 press conference in Washington, D.C., where Musslewhite announced his involvement in new Agent Orange litigation.

But it is the activities in Scotland that most concern the Bar. First, assistant general counsel Steven Smoot

showed a videotape of Scottish television news' coverage of the July 15 press conference, which included a reporter's references to "the Bhopal Gang" and said, "The U.S. lawyers deny they are ambulance chasers".

Coverage in the Scottish media grew worse after someone, probably another attorney, made reporters aware of Musslewhite's disciplinary troubles in Texas, court documents said. News of the press conference reached the U.S. causing Bar officials to launch their investigation.

. . .

Musslewhite, who represented himself at the hearing, said he did not get involved with the Piper Alpha case until three days after the explosion. He said he returned home from vacation and found letters from a Scottish solicitor he was working with on an unrelated case.

Musslewhite said he called him about that case and the solicitor "volunteered that he had two cases from the Piper Alpha case and I expressed the belief there was a good chance those cases could be heard in Texas," Musslewhite said. He said he already possessed a ticket to England for an unrelated matter, but offered to move the trip up two days to meet with the Scottish solicitor.

. . .

Musslewhite complained during the hearing that Hampton, whose fees he is paying as part of the probation agreement, was not acting objectively, as a special master should.

"It's a matter of me paying for someone to investigate me and prosecute me." he said, adding the Bar should pay Hampton.

. . .

APPENDIX I-28

The Houston Post
October 18, 1988

(Excerpts from)

MUSSLEWHITE DISCIPLINARY HEARING BEGINS

By Brenda Sapino

An attorney for the state bar, which has alleged Houston personal injury lawyer Benton Musslewhite violated his disciplinary probation, said Monday he has no evidence Musslewhite directly contacted accident victims in Scotland.

Steven Smoot, legal counsel for the State Bar of Texas, said he has no evidence that Musslewhite ever contacted any victim or relative of a victim of the July 6 Piper Alpha oil platform rig explosion in the North Sea.

Smoot testified Monday during a hearing on the bar's request for visiting state District Judge Solomon Casseb Jr. to revoke Musslewhite's

disciplinary probation, an action that could prevent Musslewhite from practicing law for longer than a 90-day suspension set to begin Nov. 1.

The bar alleges that Musslewhite may have violated the terms of his probation when he went to Scotland to meet with solicitors.

. . .

Musslewhite said he had an arrangement to refer any litigation to Houston attorney John O'Quinn.

. . .

APPENDIX I-29

Houston Post
July 11, 1989

(Excerpt from)

LAWYER RECEIVES REPRIMAND IN SETTLEMENT OF STATE BAR SUIT

By John Mecklin

Prominent personal-injury attorney John M. O'Quinn received a public reprimand but no serious sanctions in the settlement of a widely publicized disciplinary lawsuit filed against him by the State Bar of Texas.

. . .

In an emotional interview Monday O'Quinn said he had been unfairly "dragged through the mud" during the bar's investigation and lawsuit, which were the subject of numerous news reports over a period of months.

"I'd like to say this: I think it was wrong for them (the bar and its attorneys) to try me in the press. I think a lot of things were said about

me that were false -- not think, I know (they were false)".

. . .

But the settlement's relatively mild disciplinary action contrasts sharply with early allegations by an attorney and a private investigator hired by the bar of widespread wrongdoing by O'Quinn.

From the start, the bar's investigation, which began in 1986, was surrounded by controversy.

The bar's board of directors took the unusual step of hiring Tom Alexander, also a prominent civil attorney in Houston, as a special prosecutor. Alexander inturn hired private investigator Clyde Wilson to pursue the investigation.

But then the State Supreme Court, which controls the bar's budget, refused to pay Alexander's $250,000 fee because there was no precedent for it.

And was details of Wilson's investigation began to leak into the press, some disgruntled bar officials publicly referred to Alexander as a "runaway prosecutor." They charged Alexander's investigation was being backed "vigilante" groups seeking to punish a prominent personal injury lawyer.

. . .

Alexander said, "I sincerely hope that this public reprimand and probation will deter others from the same sort of activity."

Still, Alexander added, "It's a wrist-slap."

David Berg, one in a team of attorneys who represented O'Quinn, retorted. "To the extent that the case was tried in the press by Tom Alexander, I think he (O'Quinn) has been punished quite enough, thank you."

. . .

Most recently, O'Quinn won a judgment of at least $600 million from Tenneco for an Ohio gas producer. Among numerous other multimillion-dollar cases, O'Quinn also was a member of the legal team that negotiated a $250 million settlement of the Agent Orange suit on behalf of Vietnam veterans.

APPENDIX I-30

Texas Lawyer
July 10, 1989

(Excerpts from)
O'QUINN BATTLES NEARING AN END
Truce With Bar Called a Matter of 'Economics'

By Mark Ballard and Robert Elder Jr

The legal cloud over John M. O'Quinn began evaporating when the noted Houston trial lawyer accepted a proposed settlement of his disbarment suit and the key witness in a jury tampering case recanted his allegations.

O'Quinn will not lose one day of practice under the deal, which had not been finalized by press time on July 6. But the State Bar of Texas board of directors on June 29 reportedly rebuked its general counsel, Steven D. . . . Peterson, for his handling of Texas' most celebrated disbarment suit.

Two members of the Bar's Grievance Committee 4-E said Peterson recommended a light penalty for O'Quinn because the Bar could not afford to fight O'Quinn's team of renowned lawyers, an outcome many predicted when the general counsel took over from a special prosecutor.

. . .

The Bar, which last year defeated O'Quinn's constitutional challenge of the Bar's anti-barratry rules, claimed in the disciplinary suit that O'Quinn had hired eight "runners" to solicit more than 100 personal injury clients.

Sometimes the runners dressed like priests or paramedics and slipped into hospitals to give prospective clients a brochure that outlined O'Quinn's most famous verdicts, according to court records.

The chairman of the grievance committee that agreed to settle the

case with O'Quinn, Harry A. "Red" Loftus, confirmed July 5 that the deal - subject to court approval - calls for O'Quinn to receive two years' probation and perform 100 hours of community service. Loftus, a name partner in Houston's Abramowitz & Loftus, stepped down July 1 as grievance committee chairman.

But one of O'Quinn's defense lawyers, who asked not to be identified, said he interprets the penalty to mean that probation lasts only until the 100 hours of community service is completed, and O'Quinn has two years to complete it.

. . .

Saying that Bar rules forbid him from commenting on grievance committee deliberations, Loftus confirmed the panel was motivated in part by lack of evidence and escalating costs.

Two other members of the grievance

committee, both speaking on the condition of anonymity, said the documentary evidence against O'Quinn contained what one member called "significant gaps." Plus, several key witnesses could no longer be located, the committee member said.

When Loftus presented the final draft of the settlement at its June 22 meeting, the grievance committee considered Peterson's assessment that the O'Quinn case would be difficult to win, the sources said.

"We were made to feel that we were somewhat handicapped in making the case against this guy [O'Quinn]," said one committee member.

Peterson had told the committee that O'Quinn had spent about $3 million on the case and that the Bar had spent up to $70,000, the two sources said.

"Steve told us, "I'll do what you all say but this guy can outspend the

Bar and I'm facing [five] high-powered attorneys," the panelist said.

"The bottom line is that it just came down to economics, agreed the other grievance committee member. "We more or less compromised. And rather than risk losing the whole case, at least with a probated sentence we could hold it over his head for a while."

. . .

The fallout over the settlement also played a large part in an unusual display of dissatisfaction with Peterson by Bar leaders.

At its June 29 meeting, the Bar's board of directors voted to give its top two executives, Peterson and executive Director Larry K. Montgomery, relatively modest raises.

. . .

And at least two of the directors who voted for the raise said the issue

upsetting some directors was the O'Quinn case and Peterson's role in the settlement.

"It's got a lot to do with it," said one member who approved the raise.

. . .

"In effect, O'Quinn has beaten the system," said William Key Wilde, who chaired the Bar committee that oversees the general counsel's office and initiated the O'Quinn prosecution in late 1986. At the time, Wilde, a Houston partner at Bracewell & Patterson, favored hiring a special prosecutor to handle the case.

"This [the settlement] was the sort of thing that we suspected would have happened all along", Wilde said July 6. "We never felt Steve Peterson was a match for the legal team O'Quinn was able to put together."

O'Quinn got a better deal than Peterson offered in January 1987,

when the Bar was considering whether to hire a special prosecutor. Wilde said.

At that time, O'Quinn had agreed to a public reprimand and to testify against Houston solo practitioners Benton Musslewhite and Newton B. Schwartz, two other lawyers then facing disciplinary suits, Wilde said. But the grievance committee, which had different members then, refused to approve that deal, he said.

"It seems to me ironic that Steve Peterson would say it was too expensive when Tom Alexander agreed to do this for free." Wilde said.

Alexander, a name partner at Alexander & McEvily of Houston, supervised the case for 10 months before the Bar board of directors fired him as special prosecutor in October 1987. Peterson retook control of the case at that point.

Not surprisingly, Alexander also was

critical of the pending deal in O'Quinn's case.

"To say that the State Bar cannot afford to prosecute John O'Quinn is to say the State Bar is pretty weak and maybe it does need legislative supervision." Alexander said July 5. The settlement "really makes a mockery of the State Bar rules."

. . .

APPENDIX I-31

Texas Lawyer
August 14, 1989

(Excerpts from)
SCHWARTZ ACCEPTS 2-MONTH
SUSPENSION IN SETTLEMENT

By Richard Connelly

Houston solo practitioner Newton Schwartz has accepted a two-month suspension and a public reprimand to end the disciplinary suit brought against him by the State Bar, court documents show.

Schwartz, a prominent personal injury plaintiffs' lawyer accused of mishandling client funds and improperly financing litigation, finishes his suspension Aug. 30. The order containing the agreement was signed by visiting Judge Solomon Casseb of San Antonio on June 27.

. . .

The charges against Schwartz came

out of the high-profile "Masters of Disaster" investigation begun by the Bar in 1986. Although the investigation centered on personal injury lawyers accused of hiring runners to solicit cases from accident victims, Schwartz however was never charged with improper solicitation.

With Schwartz' settlement, the three disciplinary suits filed in the investigation have come to an end.

Houston attorney John O'Quinn's case garnered the most attention, because of his string of multi-million dollar verdicts, his star-studded defense team and his failed constitutional challenge to the Bar's anti-solicitation rules. O'Quinn, named partner in Houston's O'Quinn, Kerensky & McAninch, settled his suit June 30 by agreeing to a public reprimand, 100 hours of community service and reimbursement of $38,000 to the State

Bar for investigatory expenses.

The harshest penalty went to Houston solo practitioner Benton Musslewhite, like O'Quinn, accused of hiring runners. Musslewhite, who was also accused of fee-sharing and ignoring cases, initially settled his case Feb. 1, 1988, with a 90-day suspension to begin in November of that year. He was to take on no new clients before the suspension started, according to the agreement.

Nine months later, however, Casseb ruled Musslewhite had violated his parole and ordered a three-year suspension. The suspension has begun, although Musslewhite is fighting the ruling in federal court.

Casseb's order came after Musslewhite traveled to Scotland in the wake of an oil rig disaster. Musslewhite claimed he was conferring with Scottish solicitors and planned to

refer all cases to O'Quinn, but Bar officials said his actions violated his parole condition barring new business.

Schwartz, Musslewhite and O'Quinn were members of the plaintiffs' management committee in the Agent Orange litigation of the mid-1980s. Schwartz and O'Quinn also were among the plaintiffs' lawyers who helped finance the massive, multi-district case that blamed chemical manufacturers for the ailments suffered by Vietnam veterans who came in contact with the toxic defoliant.

APPENDIX I-32

Houston Post
May 10, 1984
(Excerpts from)

CITY LAWYER HERO IN AGENT ORANGE

The document that changed Houston lawyer, Benton Musslewhite's life--and now will affect the lives of possibly as many as 100,000 Vietnam veterans as a result -- was a memo concerning a 1965 meeting between representatives of seven chemical companies.

The gist of the memo, Musslewhite reasons, was that those seven chemical companies had realized the defoliant Agent Orange they were producing for the U.S. government contained dioxin, one of the most toxic substances known to man.

What caught his attention was that those representatives decided not to

tell the Pentagon what they had learned.

As a result, seven more years passed before the government halted the spraying of Vietnamese jungles with millions of gallons of the chemical.

"I just said, 'I can't believe it. I can't believe anyone would do this, would allow that to continue knowing what they did,' and I just couldn't say no once I knew that." he said.

Musslewhite called the lawyer for the veterans group Citizen Soldier in New York City back and agreed to accept calls from veterans who believed the illnesses they suffered stemmed from Agent Orange.

On Sunday, Musslewhite and seven other lawyers acting as a master committee negotiated the largest settlement in a products liability case in this nation's history -- one that could bring those veterans as much as

$750 million.

Without Musslewhite, though, sources close to those negotiations and even some committee members readily concede, those veterans might never have gotten a penny.

"Musslewhite has definitely been one of the most active and most involved in the case." said Houston lawyer John O'Quinn, another member of the committee.

"Benton has persevered. He all along has been one of the three that has kept the ship afloat," conceded Newton Schwartz, the other Texas attorney on the panel. "That has been his role through thick and thin."

It was Musslewhite who organized 1,500 veterans -- including almost 400 Texans -- and filed their claims. It was Musslewhite who argued strategy with a group of New York and Rhode Island lawyers originally assigned to

monitor claims from across the nation.

It was Musslewhite who recruited O'Quinn and Schwartz and the money they had available to the eight-member panel when the original group of New England lawyers almost gave up.

O'Quinn -- by his own estimate-- has contributed $300,000 to $400,000 excluding his own time. Schwartz says he has tossed in $150,000 cash and up to a quarter of a million in time and research.

"Benton has probably worked on this himself for 5,000 or 6,000 hours, almost steady on it for four years," Schwartz said.

Musslewhite estimates his own contribution at almost a quarter of a million dollars -- so much that rent on his own law office in the 609 Fannin Building is "a few months behind," he says.

He doesn't own a home and is still

$3 million in debt by his own estimate.

Benton Musslewhite was hardly the man to take on seven massive chemical companies or the federal government.

He holds law degrees from Southern Methodist University and Georgetown University and was licensed in April 1954. He worked in a Dallas firm, then two years for judge advocate general's corps at the Pentagon and later practiced in Lufkin with his father.

As an active Democrat at one time, he lost a congressional seat in 1962 by 41 votes after being tagged a liberal. He lost the same seat by 11,000 votes in a second outing four years later.

Sen. Ralph Yarborough then made him his legislative assistant. But when Yarborough left office two years later, Musslewhite moved to Houston and began pursuing real estate ventures and taking personal injury cases.

89-555

Supreme Court, U.S.
FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

*

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

* * *

Volume II

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283 pp

APPENDICES TO PETITION
FOR WRIT OF CERTIORARI

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D. Order of Supreme Court of Texas Denying Mandamus, Concerning Supersedeas.

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2. National Article Concerning Dispute Between Musslewhite and O'Quinn and U.S. Army Over Arrow Air Cases.
3. Bar Officials Launch Trial-In-Press; Announce 17 Houston Lawyers Being Investigated.
4. Detailed Article Concerning "Masters of Disaster" Investigation.
5. O'Quinn Complains of Selective Prosecution; Discusses Appointment of Special Prosecutor.
6. ABA J1. Article Re "17 Lawyer" Investigation, Discussing Mostly Musslewhite and O'Quinn.
7. Further Discussion in Press Of Special Prosecutor and Filing Of Disbarment Suits Against Musslewhite, O'Quinn and Schwartz.
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12. Article Announcing 2nd Disbarment Suit Against Musslewhite.
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17. Special Prosecutor Terminated Because Of Controversial, Trial-In-The-Press, Vigilante Tactics.
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J. Disbarment Petition Against Benton Musslewhite, Concerning Solicitation.

K. Disbarment Petition Against John O'Quinn, Concerning Solicitation.

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M. Excerpts From Offer Of Reprimand To Musslewhite From Committee 4-A And Rejection By Musslewhite.

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R. Benton Musslewhite Affidavit Filed In State Court Of Appeals About All Events, But Particularly About Selective Prosecution And Harm Resulting From Denial Of Supersedeas.

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U. Motion For Continuance Filed At Revocation Trial, Asserting Violation Of Musslewhite's Procedural And Substantive Due Process Rights, Because Of Inadequate Notice Of Trial.

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W. Rule 47 Motion Filed In Trial Court, Requesting Supersedeas Of Suspension Judgment.

X. Papers Reflecting Requests By Musslewhite Of State Court Of Appeals To Expedite Appeal And Rejection By Court Of Appeals.

Y. Rule 49(b) Motion Filed In State Court Of Appeals By Musslewhite, Requesting Such Court To Require Supersedeas.

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AA-2. Excerpts From Musslewhite's Motion To Defer Suspension, Which Was Partially Granted.

AA-3.Excerpts From Brief Of State Bar In State Court Of Appeals, Demonstrating That State Bar Does Not Contend That Musslewhite Poses Threat Of Harm To Clients Or Public.

BB-1.Gloria Chaplin's Affidavit, Establishing Harm To Clients Resulting From Improvident Suspension Of Musslewhite.

BB.2.Ms. Chaplin's Trial Court Testimony To Same Effect.

CC.Excerpts From Trial Court Uncontradicted Testimony Of Musslewhite and Newman Demonstrating That Musslewhite Objected To Running Of Ad And Sending Of Letter Re Piper Alpha Matter.

DD.Articles Concerning Selective Prosecution, Including Comments About The State Supreme Court's Observations Re Selective Prosecution.

EE.Excerpts From Briefs Filed By Musslewhite In State Court Of Appeals, Discussing Points Of Error, etc.

APPENDIX J

CAUSE NO. 86-44452

THE STATE BAR OF TEXAS	IN THE DISTRICT COURT
VS.	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	270TH JUDICIAL DISTRICT

DISCIPLINARY PETITION

Petitioner, the Grievance Committee for State Bar District Number 4-C, State Bar of Texas, complains of Respondent, Benton Musslewhite, showing the Court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the State Bar Rules. Respondent is an attorney licensed to practice law in Texas and a member of the State Bar of Texas. Respondent is

a resident of Harris County, Texas. An officer may serve citation on Respondent at 1815 Walker, Suite 1535 Esperson Building, Houston, Texas 77002.

II.

Various non-lawyers, including, but not limited to, Robert Loving, James C. McNeilley, Joe Coddington, Lloyd Donner, Terry Clark, Rita Laird, and Gary Thomas, have at Respondent's request, recommended employment of Respondent or John M. O'Quinn to various potential clients who had not sought their or Respondent's or John M. O' Quinn's advice regarding employment of an attorney. Some of such recommendations resulted in Respondent's or John M. O'Quinn's employment and some did not. In instances where employment resulted, Respondent or John M. O'Quinn paid some

of these non-lawyers sums of money for recommending and securing such employments. Respondent also promised to pay and/or paid some of these non-lawyers a share of Respondent's fee in the cases. O'Quinn's actions were with Respondent's knowledge and/or at his behest. Such conduct violates Disciplinary Rules 1-102(A) (1) (2) (3) (6), 2-103(A) (C), and 3-102(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

III.

Respondent and John M. O'Quinn entered into an agreement by which O'Quinn was to finance Respondent's law practice for and in consideration of the assignment to O'Quinn of a portion of Respondent's attorney's fees to be earned in various cases in the future. O'Quinn made advances to Respondent on a case by case basis. O'Quinn would

thereafter be repaid by Respondent with a share of the fees in the cases. O'Quinn would perform no legal services on behalf of the clients in order to share in the fee, and assumed no responsibility for the representation of the clients. The clients had no knowledge of the fee division and did not consent to same. Such conduct violates Disciplinary Rules 1-102(A)(I)(6) and 2-107(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

Petitioner prays for judgment that Respondent be disbarred, suspended, and reprimanded as the facts shall warrant and that petitioner have such other

relief to which entitled, including costs of court and attorney's fees.

Respectfully submitted,

ALEXANDER & MCEVILY
By: Tom Alexander
Tom Alexander
TBA 1000000
Five Post Oak Park
Ste 2400
Houston, Texas 77027
713/439-0000
ATTORNEYS FOR PETITIONER

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
By: Steven M. Smoot
Steven M. Smoot
First Assistant Gen. Counsel
State Bar No. 18774300
Post Office Box 12487
Austin, Texas 78711
512/463-1381

APPENDIX K

CAUSE NO. 87-09377

THE STATE BAR OF TEXAS	[ ]	IN THE DISTRICT COURT
V.	[ ]	HARRIS COUNTY, TEXAS
JOHN M. O'QUINN	[ ]	189TH JUDICIAL DISTRICT

FIRST AMENDED DISCIPLINARY PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Petitioner, the Grievance Committee for state Bar District Number 4-E, State Bar of Texas, complains of Respondent, John M. O'Quinn, showing the court:

I.

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex. Rev. Civ. Stat. Ann. art. 320a-1 (1979) and the State Bar Rules. Respondent is an attorney licensed to practice law in Texas and a member of

the State Bar of Texas. Respondent is a resident of Harris County, Texas. Respondent has appeared herein.

II.

A. Various non-lawyers, including, but not limited to, Robert Loving, James C. McNeilley, Joe Coddington (individually and under the auspices of D.L.C., Inc.), Sonny Long, Kirby McDowell, Rocky McDowell, Lloyd Dohner and Terry Clark (individually and under the auspices of American Overseas Investigators), Jerry White, James Grafton and Thomas Branch (individually and under the auspices of Plains Overseas Group, Inc.), Gary Thomas, and Rita Laird, have at Respondent's behest recommended employment of Respondent to various potential clients who had not sought their or Respondent's advice regarding employment of an attorney. Such

conduct violates Disciplinary Rules 1-102(A)(1)(2)(3)(6) and 2-103(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

B. Some of such solicitations resulted in Respondent's employment and some did not. In instances where employment resulted, Respondent paid some of these non-lawyers, or their front organizations, sums of money for recommending and securing such employments. Such conduct violates Disciplinary Rules 1-102(A)(1)(6) and 2-103(C), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

III.

On December 12, 1985, several persons died in the crash of the Air Arrow Flight in Gander, Newfoundland. Robert Loving, a non-lawyer, thereafter at Respondent's behest contacted the

Roberts family in Mississippi and recommended the professional employment of Respondent to represent the family on claims arising out of the death of Mr. Roberts in the crash. The Roberts family did not seek Loving's or Respondent's advice regarding employment of an attorney. The Roberts family did so employ Respondent. Respondent then paid Loving a sum of money for recommending and securing the employment by the Roberts family. Such conduct violates Disciplinary Rules 1-102(A)(1)(2)(3)(6) and 2-103(A)(C), and constitutes professional misconduct under State Bar Rules art. X, 7(1)(5).

IV.

Respondent and Benton Musslewhite, an attorney, entered into an agreement by which Respondent was to finance Musslewhite's law practice for and in

consideration of the assignment to Respondent of a portion of Musslewhite's attorney's fees to be earned in various cases in the future. Respondent made advances to Musslewhite and Respondent would thereafter be repaid by Musslewhite with a share of the fees in the cases. Respondent would perform no legal services on behalf of the clients in order to share in the fee, and assumed no responsibility for the representation of the clients. The clients had no knowledge of the fee division and did not consent to same. Such conduct violates Disciplinary Rules 1-102(A)(1)(6) and 2-107(A), and constitutes professional misconduct under State Bar Rules art. X, 7(1).

V.

On or about May 2, 1986, the State Bar of Texas sent to Respondent a

letter requesting Respondent to furnish a written response to various allegations of professional misconduct. Respondent failed to furnish the requested information or to assert grounds for failure to do so. Such conduct constitutes professional misconduct under State Bar Rules art. X, 7(4).

Petitioner prays for judgment that Respondent be disbarred, suspended, or reprimanded as the facts shall warrant and that Petitioner have such other relief to which entitled, including costs of court and attorney's fees.

Respectfully submitted,

Office of the General Counsel
STATE BAR OF TEXAS
P. O. Box 12487
Austin, Texas 78711
512/463-1381

By: /s/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing First Amended Disciplinary Petition has been served on Respondent's attorneys of record, David Berg, 3702 Travis Street, Houston, Texas 77002, Richard Haynes, P.O. Box 701068, 4300 Scotland, Houston, Texas 77270-1068; T. G. Treece, 1303 San Jacinto, Houston, Texas 77002, Luther H. Soules III, 800 Milam Building, San Antonio, Texas 78205; Stanley Binion, 3300 Allied Bank Plaza, Houston, Texas 77002; James R. Leahy, 3300 Allied Bank Plaza, Houston, Texas 77002; William V. Dorsaneo III, 3315 Daniel, Dallas, Texas 75275, by delivery of a true copy to each of them by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 11th day of December, 1987.

/s/ Steven M. Smoot
Steven M. Smoot

APPENDIX L

(Excerpts from)
COMPLAINTS AGAINST ATTORNEYS
AND GRIEVANCE PROCEDURES

The State Bar of Texas
P. O. Box 12437
Austin, Texas 78711

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or exercise permanent loss.

. . .

A lawyer may lose the trust of a client for various reasons. In many cases in which a client becomes

dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions of the Code of Professional Responsibility have been violated.

An honest disagreement about how a case should be handled - or should have been handled - does not constitute misconduct. Neither does a mistake. Lawyers are human.

Sometimes they make mistakes just like everyone else. If the mistake causes a loss that client may be able to recover the loss from the lawyer through civil remedies. A mistake or error in judgment, however, is not misconduct.

Finally, there are situations which a client may find most annoying but which do not constitute misconduct. An example would be the lawyer's failure to fully explain what is going to happen to the client's case the

lawyer's failure to respond to the client's telephone calls.

While such situations usually do not constitute misconduct, the State Bar is anxious to see them corrected and will generally suggest to the lawyer the steps which need to be taken to resolve them to prevent their recurrence.

. . .

PROCEEDINGS CONFIDENTIAL

Disciplinary proceedings are confidential until they reach the point at which the district grievance committee takes some public action. The reasons for this are to protect any confidential communications between the attorney and his or her client to allow the committee to conduct its investigation in a fair and objective fashion and to prevent any unfair publicity about the attorney or the complainant if the complaint is found to lack substance.

Complaints Against Attorneys and Grievance Procedures

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or even its permanent loss.

A lawyer may lose the trust and confidence of a client for various reasons. In many cases in which a client becomes dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions of the Code of Professional Responsibility have been violated.

An honest disagreement about how a case should be handled — or should have been handled — does not constitute misconduct. Neither does a mistake. Lawyers are human. Sometimes they make mistakes just like everyone else. If the mistake causes a loss the client may be able to recover the loss from the lawyer through civil remedies. A mistake or error in judgment, however, is not misconduct.

Finally, there are situations which a client may find most annoying but which do not constitute misconduct. An example would be the lawyer's failure to fully explain what is going to happen to the client's case or the lawyer's failure to respond to the client's telephone calls.

While such situations usually do not constitute misconduct, the State Bar is anxious to see them corrected. And will generally suggest to the lawyer the steps which need to be taken to resolve them and to prevent their reoccurrence.

PROCEEDINGS CONFIDENTIAL

Disciplinary proceedings are confidential until they reach the point at which the district grievance committee takes some public action. The reasons for this are to protect any confidential communications between the attorney and his or her client, to allow the committee to conduct its investigation in a fair and objective fashion, and to prevent any unfair publicity about the attorney or the complainant if the complaint is found to lack substance.

APPENDIX L

(Excerpts from)

COMPLAINTS AGAINST ATTORNEYS AND GRIEVANCE PROCEDURES

GENERAL CONSIDERATIONS

When they enter the practice of law, all lawyers take an oath to uphold the law and to abide by the Code of Professional Responsibility promulgated by the Supreme Court of Texas. Those who violate the standards of professional conduct are subject to professional discipline. In serious matters such discipline could mean the suspension of the privilege of practicing law or even its permanent loss. . . . .

A lawyer may lose the trust of a client for various reasons. In many cases in which a client becomes dissatisfied, however, grounds for discipline do not exist. A lawyer may be disciplined only if the provisions

APPENDIX M-1

Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

March 26, 1986

Ms. Jacalyn Scott, Chairperson
GRIEVANCE COMMITTEE
DISTRICT NO. 4A
STATE BAR OF TEXAS
1121 Walker, Suite 700
Houston, Texas 77002

RE: File No. 453-385; Barham - Musslewhite Judgment by Grievance Committee 4A

Dear Ms. Scott:

This is to advise you that I do not agree to the Public Reprimand. I made no misrepresentation to anyone, did not solicit the case, and violated no Canons of Ethics. I am referring this matter to my attorney, Mr. Wayne Paris.

Sincerely,
/s/ Benton Musslewhite
Benton Musslewhite

BM/dm

APPENDIX M-2

(Excerpts from offer of repremand)

OFFER OF GRIEVANCE COMMITTEE
BEFORE THE GRIEVANCE COMMITTEE FOR
STATE BAR DISTRICT NO. 4A
STATE BAR OF TEXAS

APPLICANT AGAINST	[]	
	[]	
BENTON MUSSLEWHITE	[]	FILE NO.453-385
TBA #19540414	[]	
	[]	
HARRIS COUNTY,	[]	
TEXAS	[]	

AGREED JUDGMENT OF PUBLIC REPRIMAND

BE IT RECOMMENDED that a complaint was docketed with the Grievance Committee for State Bar District No. 4A, State Bar of Texas, against Benton Musslewhite, hereinafter referred to as "Complainant", alleging certain acts of professional misconduct on the part of said Respondent.

The Committee conducted a hearing on this complaint, at which Respondent after having been duly notified of the

complaint and after having been duly notice for said hearing, appeared and presented evidence in his own behalf.

.....

By reason of the foregoing findings of fact and conclusions of law, the Committee is of the opinion that the Respondent should be publicly reprimanded and will accept such action as final; it is, therefore, ORDERED that the Respondent is hereby publicly reprimanded, which public reprimand shall be fully entered upon the Respondent agreeing to its entry by signing and having acknowledged the Consent to Judgment appended to this agreed Judgment of Public Reprimand, all in accordance with the provisions of the State Bar Rules governing the State Bar of Texas.

SIGNED this ___ day of _____, 1986.

GRIEVANCE COMMITTEE

DISTRICT NO. 4A
STATE BAR OF TEXAS
By: _____
Jacalyn Scott, Chairperson

CONSENT TO JUDGMENT

In connection with charges of professional misconduct filed against me and heard by your Committee, I hereby consent to entry of the attached Judgment in the form submitted to me pursuant to Article X, Section 14, of the State Bar Rules.

SIGNED this ____ day of _____, 1986.

_____
Benton Musslewhite

APPENDIX N

(Excerpts from)
Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

July 29, 1986

Disciplinary Review Committee
State Bar of Texas
c/o Franklin Jones, Jr., Chairman
201 W. Houston
Marshall, Texas 75670

Re: Request for removal of complaints against Benton Musslewhite from Grievance Committee of Houston, Texas

Dear Mr. Jones:

It is with a certain degree of reluctance that I write this letter requesting that all grievances filed against me which are now under consideration by Grievance Committee 4-C of Houston, Texas, be removed from that Committee and assigned to another Committee for consideration and handling.

I am aware of the fact that Mr. John O'Quinn, another member of the Bar who is an object of a general investigation by Committee 4-C, previously filed a similar motion with this same Committee, which I understand was granted. While I would not be so presumptuous as to assert that the action by this Committee with regard to the O'Quinn motion would automatically require the granting of a similar motion filed by me, I do want to point out that many of the grounds asserted by Mr. O'Quinn could be asserted with equal force by me. For example, his contentions with respect to Ms. Gloria Chaplin and Ms. Eva Fontenot, two of the representatives in the class action suit involving the dumpsites in the Eastern part of Harris County, Texas, are more appropriate to me and to the efforts that I have continued to make in that lawsuit than with regard to Mr.

O'Quinn, because Mr. O'Quinn had withdrawn from the lawsuit quite some time ago, while I am continuing to represent these people.

Even so, since I do not take the filing of this kind of a motion lightly, I had resolved not to request a transfer, even after Mr. O'Quinn's action, provided I could receive assurances from Mr. Thomas Johnson, then Assistant General Counsel handling the Committee 4-C investigation, that I would not be prejudiced by the hostility which Mr. O'Quinn's motion had apparently generated. In fact, I had requested a meeting with Mr. Johnson in that regard and was scheduled to meet with him early last week but that meeting was cancelled when Mr. Johnson resigned. Then, the next day there appeared an article in the Houston Chronicle (Wednesday, July 23, 1986) under the byline of Ms.

Bonnie Britt, which I am attaching to this letter and incorporating herein by reference. That article makes it very clear that I now have no choice but to ask that all grievances against me, being handled by Committee 4-C, be transferred to another Committee for consideration and handling.

The article clearly revealed that someone connected with Committee 4-C, probably either Mr. Romeo Garcia, its investigator or Mr. Johnson, its counsel, revealed confidential matters handled by a previous Grievance Committee and by Committee 4-C in such a way that, not only were the matters revealed not true or correct, but were obviously designed to cause me as much personal harm as possible. I mentioned Mr. Garcia because Ms. Britt has taken him to three of my clients, on two separate occasions (Ms. Chaplin, Ms. Fontenot and Mr. Joe Coddington), in

an effort to get them to discuss alleged misconduct by me. The Bonnie Britt article had a devastating and tremendously damaging impact upon me and I certainly would be remiss if I did not ask that the investigation of me be removed to a Committee that is not tainted with such leaks and repeated violations of the State Bar disciplinary and operating rules with respect to the handling of grievances.

. . .

3. The statements Ms. Britt refers to about the 1981 investigation, attributed to me, apparently came from an article in the Texas Lawyer written by another reporter and I want to clear the record at this point and state that I have never told any reporter that Mr. Steven Peterson gave me any form of absolution. I had stated in my overall reply to Committee 4-C, a copy of which is attached hereto and incorporated

herein by reference, that Mr. Peterson had investigated the matter of solicitation following the Rita Laird affidavit, and had given me some advice about the proper sources for cases, and I had assiduously followed that advice. I was then called and asked by the reporter for the Texas Lawyer about the investigation in 1981. I do not know where she got the information about that investigation but it certainly did not come from me. I assume, since it was mentioned in my reply to Grievance Committee 4-C, that someone connected with Committee 4-C "leaked" that information also, either to Ms. Britt or to her. Wherever it came from, my only reply was that such an investigation did take place and that Mr. Peterson had looked into such matters in my office, given me some advice, and that no action was taken thereafter.

. . .

5. While anything Ms. Britt prints is suspect, if she has only partially quoted Mr. Doherty accurately, it now appears that he and perhaps other members of his Committee may have been caused to become even further hostile toward me. It is obvious, if one takes a reasonable overview of the article, that Mr. Doherty's reaction to the action taken by Mr. Peterson manifests the belief that I am the central cause of the entire episode (inasmuch as, according to Ms. Britt, Mr. Johnson apparently called Mr. Peterson to testify about the 1981 investigation involving me) and, therefore, I think any fair-minded judge or impartial Committee can see that the chance for injustice, involving the investigation of me at this point, is such that it would be in the interests of all concerned for the complaints against me

to be removed to another Committee that is not involved in the Johnson-Garcia episode. Words such as "stupid, ill-timed and unfair" (attributed to Mr. Doherty) are just too strong an indication of resentment about the whole matter to be ignored.

. . .

6. The statement by Mr. Doherty that one or more of the lawyers being investigated must have stirred up the press coverage on the investigation (which, thanks to whoever connected with Committee 4-C is working with Ms. Britt and Ms. Britt herself, has now become national in scope, e.g. Newsday, National Law Journal, etc.) is, I must say as respectfully as I can, incredulous. The last thing I would want printed in the local and national press are the extremely damaging remarks about me which could only have come from someone connected with the

Committee 4-C. You can imagine how embarrassing all of this has been to my wife and seven children, including one who is a practicing attorney in Houston. I recall that Ms. Britt was the first reporter to ask me about the investigation and I was astounded that she knew about it. I certainly was not going to lie to her about it nor was I going to say "no comment" because I was afraid she would make more of it than it deserved. My responses were only to questions asked by her (which was indisputably revealing of inside knowledge) and were carefully couched. In sum, it is very obvious that one or more persons officially connected with Committee 4-C set out, in violation of the State Bar confidentiality rules and in collaboration with Ms. Britt, to sensationalize the investigation to the extent that such Committee's further handling of the investigation would not

be in the interest of justice.

. . .

In addition to all the foregoing, Mr. Jones, I want to adopt the matters asserted by Mr. O'Quinn (to the extent they are not adverse to me - I have not seen the request he filed) and the evidence which he presented to the Oversight Committee at the time of the hearing on his request for transfer. Again, I have not been privy to what that evidence consisted of, except to the extent that I know two of my clients were called to testify, but I think it would be in the interest of an economy of justice for me to be able to incorporate such evidence into my motion and request by reference.

. . .

Finally, for all the reasons stated by Mr. O'Quinn in his motion, for all the above and foregoing reasons, and for the reasons made so apparent in the

Bonnie Britt article, it now seems to me to be very clear that it would only be fair and proper for your Committee to exercise its duties and responsibilities by transferring the grievances against myself to another Grievance Committee.

Should you need any further information or should a hearing be necessary, please advise; I will be happy to respond or to appear.

Sincerely,

/s/ Benton Musslewhite
Benton Musslewhite

BM/dm

cc:Steven B. Peterson
State Bar of Texas - General Counsel
State Bar Bldg. 1414 Colorado St.
Austin, Texas 78711

APPENDIX O

Berg & Androphy
A Partnership including a
Professional Organization
Attorneys at Law

David Berg
Board Certified Criminal Law
Texas Board of Legal Specialization
Joel Androphy

May 19, 1986

Mr. Franklin Jones
Chairman, Disciplinary Review Committee
201 W. Houston St.
P. O. Drawer 1249
Marshall, Texas 75670

RE: File No. 207-286; John O'Quinn

Dear Mr. Jones:

On behalf of my client, John O'Quinn, I request this case be transferred to another county or, failing that, to a different committee.

In January, 1985, the District 4 Grievance Committee of the State Bar of Texas initiated an investigation into the law practice of John O'Quinn. In connection with this investigation and others, Romeo Garcia, investigator for

District 4, disclosed confidential information gathered by the State Bar to member(s) of the press, including but not limited to Bonnie Britt of the Houston Chronicle, in violation of State Bar Rules, Title 14, Vernon's Ann. Civ. St., Art. 320(a)-1, Sec. 13(b), Title 14 App., Art. 10, Sec. 34(A) and (E), Art. 1, Sec. 19, Constitution of the State of Texas and the Fifth and Fourteenth Amendments to the Constitution of the United States. Mrs. Britt and Romeo Garcia were both present while he questioned Gloria Chaplin about confidential grievance matters. (See Exhibit "A").

Mrs. Britt has questioned Mr. O'Quinn about matters that were obviously leaked to her by Garcia (Exhibit "B", affidavit of O'Quinn). As a result rumors have swept through the legal community regarding the "finding" of the investigation,

including nonexistent deals made by O'Quinn and even that he had been indicted (Exhibit "B").

O'Quinn's practice has been ruined. Five members of his nine person firm quit as a result of the adverse publicity generated by the Defendants. Clients have begun to call concerned about O'Quinn's ability to continue to represent them. Some have requested their files be returned (Exhibit "B").

O'Quinn's law partner, Fred Hagans, immediately withdrew from the firm upon being informed by committee member(s) of the pending investigation of his firm. Hagans was and is an active member of Committee 4C, although he has been asked to recuse himself from active participation in this case. O'Quinn believes that his partner will necessarily be a witness before the committee on which he serves. Being investigated by a committee on which a

witness serves denies O'Quinn fair play and due process under the State and Federal Constitutions.

Mr. O'Quinn must respond to the written notification of Committee 4C by May 25, 1986. We are asking for immediate consideration of this problem or, in the alternative, for a stay of all proceedings until such time as the Disciplinary Review Committee has the opportunity to decide.

Very truly yours,

/s/ David H. Berg
David H. Berg

DHB/pw

APPENDIX O-1

AFFIDAVIT OF GLORIA CHAPLIN

THE STATE OF TEXAS

COUNTY OF HARRIS

I, GLORIA CHAPLIN, give this affidavit and swear that the facts stated herein are true and correct.

On April 30, 1986, I went downtown to see my attorney, Mr. Benton Musslewhite. As I was entering his office building that morning, Mrs. Bonnie Britt met me in the lobby and asked me to have lunch with her. I was to meet her at her office in the Houston Chronicle. I know Mrs. Britt well. She is a Houston Chronicle reporter whom I have met and talked to before in the course of her writing various articles about a hazardous chemical dumpsite near my home. After I saw Mr. Musslewhite, I went to Mrs. Britt's office to have lunch with her

and was given a message that she had already gone to lunch and that I was to join her. I then went to meet her at a salad bar in an office building at the intersection of Texas and Main Street. Mrs. Britt was with a man whom I later learned was Mr. Romeo Garcia. They had already eaten lunch together before I arrived. Mrs. Britt introduced me to Mr. Garcia and said that he wanted to talk to me. I then ate lunch with them as they drank tea. Mr. Garcia told me he was with the State Bar and wanted to talk to me about the investigation of Joe Coddington, Benton Musslewhite and several other attorneys named John O'Quinn, Charles Parker, Mike Perrin, Bill Edwards and Joe Jamail.

Further the affiant sayeth not.

/s/ Gloria Chaplin
Gloria Chaplin

SUBSCRIBED and SWORN TO before me on this 14th day of May, 1986.

/s/ Pat Wyatt

Notary Public in
and for The State
of Texas

My Commission Expires:
3-31-88

APPENDIX O-2

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared JOHN O'QUINN who, after being by me first duly sworn, did upon his oath state as follows:

In January, 1986, my law firm, then called O'Quinn and Hagans, had nine (9) attorneys. We limited our practice to civil trial work, primarily plaintiffs' personal injury cases. We had an outstanding group of attorneys and reputation. Not long thereafter rumors began that I was being investigated by the State Bar Grievance Committee for alleged solicitation of cases. My former partner, Fred Hagans is a member of State Bar Grievance Committee 4C. That is the committee investigating my case. Hagans was told about the

investigation in sufficient detail to cause him to believe I would be disbarred and that caused him to withdraw immediately thereafter from our firm. Although Mr. Hagans has been recused from my case, he still is an active member of the committee, who regularly meets with the committee to hear other matters.

Since then rumors have continued and escalated, including that I have been indicted; that my practice was being taken over by Fred Hagans; that I was offered a six (6) month suspension but it was refused; and that I was settling all my cases in anticipation of discipline. The rumors are destroying my practice. In addition to Mr. Hagans' immediately withdrawing from the firm, another four (4) attorneys have since left. Thus, of the original time (9), only three (3) attorneys beside myself remain.

I have reason to believe that Romeo Garcia, local investigator for District 4, is on a fishing expedition, researching courthouse records to find out who my clients are in order to talk to them to see if they will say anything negative about me.

Billy Davenport, a client, called to find out why Romeo Garcia, an investigator from the State Bar was bothering him. This caused him concern about whether something was going on to affect his case. Other clients are asking for their files back. One client named Jill Crook called me to ask if it was true that I was going to be disbarred. Her "best" friend had called her to tell her that she had better get a new attorney because I was going to be disbarred. The friend told Mrs. Crook that she had heard this rumor from an attorney. Mrs. Crook's friend further related that the

attorney (whose name I can supply) was saying that he would be happy to work on the case and could even do a better job since I was in trouble with the Bar. I recently settled a nursing home case in which I represented one Mrs. Hazel McKinnon and others. There was a newspaper article about the case and my associate tells me a member of her family has been contacted to find out how we got it. They don't have to look far. It was referred to me by Larry Doherty, Chairman of Grievance Committee 4C.

I wish to emphasize that not one client has filed a complaint against me. Under these circumstances it seems most improper for a State Bar investigator to be calling my clients at random to see what they might say. Such conduct destroys the attorney-client relationship.

I have also reason to believe that

the investigator, Romeo Garcia, is sharing information with a newspaper reporter named Bonnie Britt of the Houston Chronicle. (See attached affidavits. Mrs. Britt came to interview me about matters she had heard about me related to this investigation. I asked her to tell me what story she had heard. She acknowledged having met with and talked to Romeo Garcia. She then asked about specific clients and the very matters that are under investigation, per notice letter sent to me by the Grievance Committee.

/s/ John O'Quinn
John O'Quinn

SWORN TO and SUBSCRIBED TO before me on this___ day of _____, 1986.

/s/
Notary Public in and for
The State of Texas

My Commission Expires:

_____

APPENDIX P-1

IN THE 270TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

IN THE STATE BAR OF TEXAS	[]	CAUSE NUMBER 86-44,452
BENTON MUSSLEWHITE	[]	

RULE 257 MOTION
FOR CHANGE OF VENUE

TO THE HONORABLE SOLOMON CASSEB, JR., PRESIDING JUDGE

Pursuant to Rule 257, Texas Rules of Civil Procedure, BENTON MUSSLEWHITE, Respondent, respectfully moves the Court for a change of venue. In support of this motion Respondent would show the following:

I.

Because of the extensive prejudicial pre-trial publicity which has been focused on this case and a related case styled THE STATE BAR OF TEXAS V. JOHN O'QUINN, CAUSE NUMBER 87-009377, an impartial trial cannot be had in

Harris County, Texas.

II.

In support of this motion Respondent has attached hereto his own Affidavit and the affidavits of three credible persons, each of whom is a resident of Harris County, Texas.

WHEREFORE, Respondent prays this motion be granted and that the venue of this cause be transferred to a district where an impartial trial can be had.

Respectfully submitted,

/s/ Ray Bass
Ray Bass
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
ATTORNEY FOR RESPONDENT
TBC #01884000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Change of Venue and copies of the attached affidavits were personally

delivered to Steven Smoot, Assistant General Counsel, State Bar of Texas, on November 9, 1987.

/s/ Ray Bass

Ray Bass

APPENDIX P-2

IN THE 270TH JUDICIAL DISTRICT
COURT OF HARRIS COUNTY, TEXAS

IN THE STATE BAR	[]	
OF TEXAS	[]	CAUSE NUMBER
	[]	86-44,452
BENTON MUSSLEWHITE	[]	

MOTION FOR INDIVIDUAL VOIR DIRE EXAMINATION ON QUESTION OF PRE TRIAL PUBLICITY

TO THE HONORABLE SOLOMON CASSEB, JR., PRESIDING JUDGE OF SAID COURT:

BENTON MUSSLEWHITE, Respondent, respectfully moves the court to permit counsel to question members of the jury panel individually, outside the presence and hearing of others members of the panel, on the question of pre-trial publicity related to this case. In support of this motion Respondent would show the following:

I.

This case and a related case styled THE STATE BAR OF TEXAS V. JOHN O'QUINN

have been the focus of extensive prejudicial pre-trial publicity. In order to determine the existence of any challenges for cause to individual members of the jury panel, and to intelligently exercise his peremptory challenges, Respondent must question members of the jury panel about their exposure, if any, to such publicity.

II.

To conduct the questioning about exposure to pre-trial publicity in the presence of the panel as a group may very well, and in all probability would, result in contamination of those members of the panel who have not been so exposed.

WHEREFORE, Respondent prays this motion be granted and that the court permit counsel to question each member of the jury panel individually, outside the presence and hearing of other

permit counsel to question each member of the jury panel individually, outside the presence and hearing of other members of the panel, to determine (1) whether or not each member has been exposed to the pre-trial publicity about this case or the above sited related case, (2) what the individual juror has seen or heard in the media about this case, and (3) to what extent such publicity would effect the potential juror's verdict.

Respectfully submitted,

/s/ Ray Bass

Ray Bass
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
ATTORNEY FOR RESPONDENT
TBC #01884000

APPENDIX Q

(Excerpts from)

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

JUDGMENT

On November 10, 1987, the Court called the above styled, numbered, and consolidated disciplinary actions to trial. Petitioners, the Grievance Committees for State Bar District Nos. 4A and 4C, State Bar of Texas, appeared by counsel and by the District 4C Grievance Committee Chairman, and

Respondent, Benton Musslewhite, appeared in person and by counsel. Petitioners announced that they withdrew the Fifth Amended Disciplinary Petition and would proceed on the Fourth Amended Disciplinary Petition. The parties announced to the Court that they agreed to withdraw these disciplinary actions from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment as follows:

. . .

The Court determines that the appropriate sanctions is suspension from the practice of law for a period of ninety (90) days, plus suspension from the practice of law for a period of three (3) years, with suspension of imposition of the three (3) year suspension only and the placement of Respondent on probation for three (3) years.

. . .

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for period of ninety (90) days, beginning on November 1, 1988, and ending on January 30, 1989.

IT IS FURTHER ORDERED that the Court may upon written request of Respondent showing good cause and with there commendation of the Custodian, hereafter enter an order delaying commencement of the ninety (90) day suspension until no later than August 1, 1989.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988

and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit misconduct as defined by the State Bar Rules art. X 'Sec. 7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton, a full and complete list of all of his clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by

Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

IT IS FURTHER ORDERED that should Respondent violate any of the foregoing terms or conditions of probation; the Court may revoke such probation and impose a suspension from the practice of law for a period not to exceed three (3) years, aside and separate from the suspension already herein ordered, under the following procedures:

1. Either Petitioners, or the Office of General Counsel of the State Bar of Texas, shall file a written

motion to revoke with the Court briefly describing the acts and conduct that gave rise to the claimed violation of probation;

2. A copy of such motion shall be served on Respondent pursuant to T.R.C.P. 21a at Respondent's last address shown on the membership rolls of the State Bar of Texas;

3. The Court shall conduct an evidentiary hearing on such motion within forty five (45) days of the date that Respondent is served with a copy of such motion, at which time the State Bar of Texas shall bear the burden of proving its allegations to the Court under the Texas Rules of Evidence by a preponderance of the evidence;

4. After the date that Respondent is served with a copy of such motion and prior to the hearing, either party may invoke the discovery provisions of the Texas Rules of Civil Procedure;

5. The Court shall decide without the aid of a jury whether Respondent violated any of the terms or conditions of probation; and

6. Should the Court decide that Respondent has committed any violation, the Court may enter an order revoking the probation and imposing suspension from the practice of law, for a period of three (3) years, commencing on or after the date of revocation, and aside and separate from the suspension already herein ordered, and/or the Court may also impose additional terms of conditions of probation, or lengthen the period of probation; and

7. Respondent shall have the right to appeal any order of the Court finding that Respondent violated any terms or conditions of probation, and revoking probation or changing the terms, conditions, or period of

probation, as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS ALSO ORDERED that the Court shall, employ the provision of the State Bar Rules art. X Sec. 33 and appoint Hartley Hampton pursuant thereto.

IT IS FURTHER ORDERED that Hartley Hampton shall do the following:

1. Examine the client matters and files, and obtain information as to an pending matters which may be necessary to comply with his duties under State Bar Rules art. X, Sec. 33;

2. Notify Respondent's clients of the ninety (90) day suspension thirty (30) days prior to the commencement of the ninety (90) day suspension, inform them that they may seek other counsel or remain with Respondent, secure written statements from clients who wish to change attorneys, and arrange

for the surrender or delivery of the papers or property of a client who decides to obtain other counsel.

. . . .

IT IS FURTHER ORDERED that if the Court finds upon written application of Hartley Hampton, and after notice and hearing,that Respondent obtained legal employment in violation of a Disciplinary Rule, the Court shall order that Respondent shall forfeit any legal fees he may ever be entitled to arising from the employment, provided that Respondent shall have the right to appeal any order forfeiting legal fees as if the order were any other final judgment, pursuant to the Texas Rules of Appellate Procedure.

IT IS FURTHER ORDERED that Hartley Hampton shall be compensated at a reasonable rate to be established by the Court and to be paid out of attorney's fees accruing to Respondent.

IT IS FURTHER ORDERED that Respondent and Hartley Hampton shall be subject to further order of the Court relating to Respondent's law practice, after notice and hearing.

IT IS FURTHER ORDERED that all costs of Court shall be borne by the party who incurred same and that Petitioners shall recover no attorney's fees from Respondent.

SIGNED: January 24, 1988.
/S/Solomon Casseb
Solomon Casseb
Presiding Judge

APPROVED AND AGREED TO:
OFFICE OF GENERAL COUNSEL
STATE BAR OF TEXAS
/S/ Steven M. Smoot
STEVEN M. SMOOT
First Assistant General Counsel
State Bar No. 18774300
P. O. Box 12487
Austin, Texas 78711
512/463 1381
ATTORNEYS FOR PETITIONER

/S/ Benton Musslewhite
Benton Musslewhite
State Bar No. 01884000
605 Fannin Street, Suite 517
Houston, Texas 77002
Respondent

/s/ Ray Bass

Ray Bass
State Bar No. 01884000
Austin, Texas 78767
713/222 2288
A* 512/478 2277

APPENDIX R

AFFIDAVIT FILED
IN STATE COURT OF APPEALS

THE STATE OF TEXAS [ ]

COUNTY OF HARRIS [ ]

BEFORE ME appeared BENTON MUSSLEWHITE and after first being duly sworn did upon his oath state, swear and affirm as follows, to-wit:

"My name if BENTON MUSSLEWHITE I represent myself Pro Se. I am the Appellant in the above entitled and numbered cause. I make this statement with personal knowledge, of my own free will and accord, and do hereby state, swear and affirm that all the matters and facts set forth herein are true and correct. First, I do hereby swear that all the statements of facts, both direct and inferred, which are contained in the Supplemental Brief to which this affidavit is attached are true and correct. All statements concerning selective prosecution, selective enforcement, discrimination, violation of Equal Protection of the Law, violation of my Due Process rights, all the procedural irregularities mentioned therein, and all the constitutional violations contained in the Supplemental Brief are all also true and correct, including the matters and facts pertaining to the underlying action and the procedural and constitutional irregularities in that action and all the matters pertaining to the revocation action as

well.

"Second, all documents in the Appendices attached to the Supplemental Brief are true and correct; authentic; comply with business records rule; are a part of my business records; I have been the custodian of these records in my office; and I hereby state, swear and affirm that the documents are authentic and admissible as authentic documents under the Rules of Civil Procedure.

"I will now mention a few specific, important matters referred to in this supplemental Brief.

"In the case of Mrs. Barham, her deposition excerpts are true and correct. I want to add (and I was prepared to testify had the trial gone forward) that I advised the people in my office that I did not want to talk to Mr. and Mrs. Barham, primarily because they (at least Mr. Barham) were frequently intoxicated when they called and usually the only purpose of their calls was to demand money of me or else they would file a grievance. At some point in time I got tired of Mrs. Barham badgering the people in my office and told them to tell her that I would not make an advance to her. At one time, I had indicated that I would try to make an advance to Mrs. Barham, but later determined that I was financially unable to do so and so advised her. It was not long after I made that decision and so informed her of it that she filed a grievance. In connection with her case a number of other people were prepared to testify. The defendant who owned the defendant

car in the automobile accident case involving her son was going to testify that Mrs. Barham threatened him with physical harm if he did not settle with her. Mr. Ellis, the lawyer who represented the defendant insurance company was going to testify that the case was settled to the client"s satisfaction; that the case had been diligently prosecuted; that the case was one of no liability to begin with; and that the settlement reached by Appellant on behalf of Mrs. Barham's son was a good settlement under the circumstances. The guardian ad litem was going to testify to the same effect. My Co-Counsel, Mr. Hoyt, whom I asked to take over the case after Mrs Barham filed her grievance, was also going to testify that the case was settled to Mrs. Barham's satisfaction; that the case had been diligently prosecuted; that Mrs. Barham had a very abrasive personality; would call up when she or her husband were intoxicated; and was hard to deal with. He was also going to testify that she failed to show up in Court for proving up the settlement on at least two occasions, causing Judge Shearn Smith to have to threaten to get an attachment out to force her to come to court so that the settlement could be consummated. In addition, the person from my office who first talked to Mrs. Barham, Milton Long, who at that time worked for me as an investigator and legal assistant, was prepared to testify that Mrs. Eunice White, a former client, had called us and indicated that Mrs. Barham wanted to talk to us about us representing her; that in response to her call (Mrs. Eunice White's call), he called Mrs. Barham and she confirmed that she did

want to talk to my office about representing her; that he did not try to persuade her to fire her other attorney, but that in fact she had indicated that she had already discharged her other attorney; that he verified with the other attorney's office that they did not want to continue representing Mrs. Barham; and that it was only after that, that Mrs. Barham came to my office and finally met me, at which time she signed a Power of Attorney. The lawyer that she fired, prior to hiring me, Mr. Milutin, was prepared to testify also that I did not 'run under him' with regard to the Barham case and that he had absolutely no objection to my representing her. Therefore, when all was said and done, it was clear that the State Bar of Texas could not prove any kind of a disciplinary case against me in the Barham matter. In addition, Wayne Paris former Assistant General Counsel of the State Bar (who use to prosecute disciplinary cases) was prepared to testify that Appellant clearly did not violate any disciplinary rule in Barham, Merritt, Jenkins or Yorktown Travel. The combination of her admissions in her deposition; the testimony of myself, the guardian ad litem, Eugene Hoyt (who was a former District Judge), the owner of the defendant truck, Mr. Ellis the defense lawyer, Milton Long and Wayne Paris, demonstrated that the Barham case was entirely frivolous.

"The same is true of the other cases. Mrs. Merritt, whose excerpts of depositions are attached, admitted that she contacted me after she read about my victory in the Donna Johnson case in the newspaper; that I told her that I

would be difficult to contact during the Spring of 1986 because of the trials that were coming up; that she did not discover her possible cause of action against the defendant doctor until January, 1986 (she first contacted me in February, 1986); that I advised her that because the operation in question had taken place more than two years before she contacted me that the only way that she could win the case with regard to the Statute of Limitations would be through the application of the 'discovery rule'; that when she couldn't reach me by telephone, she requested the return of her file and that it was duly returned to her; that she then had hired another attorney and that such other attorney had timely filed suit on her behalf. Again, based upon my testimony and the admissions of Mrs. Merritt, and the testimony of Wayne Paris, the State Bar had absolutely no case with regard to the Merritt complaint.

"With respect to Mrs. Jenkins' complaint, I was prepared to testify that I told her, and there is a letter that we would offer in evidence confirming this, that I would not represent her unless Rob Taylor of Washington D.C. would agree to take the lead in her case (the malpractice allegedly occurred in Washington D.C.). I called and wrote Mr. Taylor about the case and he declined the case. I advised Mrs. Jenkins by telephone that Mr. Taylor was not taking the case and, therefore, I would not be involved. She said she tried to call me several times after that and that may be true, but I had made it clearthat I would not be involved if Mr. Taylor would not be involved and she knew that Mr.

Taylor had declined the case. Mr. Taylor was going to testify in my case and confirm all this. Again, there was absolutely no basis for any kind of complaint of unprofessional misconduct in the Jenkins case.

"As to the Yorktown matter, just as it is stated in the Supplemental Brief, Settle, the owner of Yorktown, was upset with me because I had been unable to pay a travel bill owed to his agency. He did consult an attorney about the bill and his attorney sued me. The bill was incurred in connection with two cases, one in Greece and one in Spain, whereby I had to go to those countries to take depositions. Mr. O'Quinn was supposed to pay the bill but there had been some discrepancy with regard to his books as to whether or not the bill might have been paid in other advances made to me. Eventually I resolved the matter with Mr. O'Quinn and paid Mr. Settle's bill in full. In the meantime, I had called him, not as an attorney, but simply as the Debtor, to see if we could work out a payment schedule whereby I could pay off the debt over a period of time, by the month. I did not discuss the merits of the case nor did I attempt to discuss the merits of the case and I had admitted in both the lawsuit and to Mr. Settle that there was no question that I owed the debt. There is absolutely no question but that there was no basis for any type of disciplinary action in the matter of the Yorktown travel complaint.

"I also point out that I requested, in the pleadings before Judge Casseb, that I should have been entitled to a hearing before the Grievance Committee

in connection with the Merritt and Yorktown complaints, a hearing which was never given me. Suddenly, all the matters against me were transferred from Grievance Committee 4-A (which is the Grievance Committee that is supposed to hear the Musslewhite complaints) to Grievance Committee 4-C, which had embarked upon a highly publicized vendetta to investigate several lawyers for 'solicitation'. It was never explained to me why my matters were transferred from Committee 4-A to Committee 4-C. I asked Steve Smoot that question on a couple of occasions but I never received a satisfactory answer. It was obvious that the reason that they were transferred to Committee 4-C was because Committee 4-C was on the war path, looking for 'scalps' and decided that I was to be one of the victims. In any event, even though I requested a hearing in the Merritt and Yorktown matters, I was never given a hearing ore any Grievance Committee on those matters and thus I was deprived of Due Process in that regard.

"Moreover, I was offered a reprimand in connection with the Barham matter. I turned down the reprimand. It was indicated to me that the four complaints which were made the basis of the first suit filed against me, namely the Barham, Merritt, Yorktown and Jenkins matters, were considered pretty much in the same category. The basis of the allegations in all four of these cases was 'willful neglect'. Steve Smoot and the General Counsel 's office, the Grievance Committee and the State Bar know that there was never any 'willful' neglect involved in any of

those cases. While I admit that, because of my heavy trial schedule, I had a difficult time of returning all telephone calls immediately after they were received by my office, I did eventually return the calls and I certainly called the clients when anything important was about to take place or needed to take place with regard to their file. Obviously the Yorktown matter was simply a debtor-creditor matter; the other three matters, which involved client-attorney relationships, were all handled in such a way that no harm occurred to any of the clients; I never did really embark upon actual representation with regard to Merritt or Jenkins and both of them knew this and knew it in time to take steps to protect their own interests by hiring other lawyers; and the Barham matter was settled completely to the satisfaction of Mrs. Barham and her son, the guardian ad litem and the District Court. I have reviewed the Texas Bar Journals to determine what kinds of punishments are being imposed in cases similar to those - the Barham, the Merritt, Jenkins and Yorktown cases. I could find no case where a lawyer was prosecuted because he owed a debt to somebody else. I could find no case where a lawyer had been prosecuted because he failed to return telephone calls. I could find no case where a lawyer was prosecuted because he refused to accept employment (such as in Jenkins). I could find no case where a lawyer was prosecuted because the lawyer in the case gave back a file when the client requested it and the return of the file took place long before any Statute of Limitations would run. I found no case where a lawyer was prosecuted for other

than 'intentional' neglect and, in fact, I found no case where a lawyer was prosecuted in situations similar to those in the Barham, Merritt, Jenkins and Yorktown matters.

"Moreover, I was told by Wayne Paris, former Assistant General Counsel of the State Bar, that it is the policy of the State Bar, when a lawyer turns down an offer of a reprimand or any lesser punishment, to systematically file suit against such lawyer, seeking disbarment and/or maximum suspension. Obviously, that is precisely what the State Bar did to me in this case - that is, they utilized a 'upping - the - ante' policy in order to deter lawyers from refusing to settle for whatever the Grievance Committee offers and in order to punish a lawyer for not accepting what the Grievance Committee offers.

"In regard to the allegations in the original proceedings pertaining to 'solicitation and fee splitting', you can tell by the allegations made in the initial complaint that the State Bar had no case. They alleged that there were seven 'runners' who improperly referred cases to me . These allegations simply were not true. Three of the people listed were clients of mine who had referred cases to me as clients and the people they referred to me were people they knew or had some relationship with. One was the President of a Veterans Organization, many members of which I had represented during the Agent Orange litigation and, in appreciation of my work for them, they made referrals to me. Two of the people named were people who had formerly been connected with the

National Maritime Union and had referred me business through the Union and had since formed their own maritime overseas investigative service, whereby they would undertake to develop business for me through other lawyers, overseas unions and other legitimate organizations. They never referred clients directly to me, but only thesuch lawyers or organizations. The last one named in the Petition, James McNeilly, I had never met in my life or ever done business with him. I told Mr. Smoot this on a number of occasions but the State Bar never dropped his name from the Petition. Soon after all the matters against me were transferred to Committee 4-C, a 'trial-in-the-press' vendetta begin. Certain people, such as Romeo Garcia, investigator for Committee 4-C, Mr. Johnson, attorney with the General Counsel's office andmembers of the Committee 4-C, started leaking fabricated or distorted information to Ms. Bonnie Britt of the Houston Chronicle and she in turn wrote highly damaging articles about myself and Mr. O'Quinn. She also saw to it that other national publications, such as 'Newsday', wrote similarly damaging articles. I do not know what her motivation was except that I was told that she was very close to Mr. Garcia and I had heard some rumors, which do not need to be detailed at this juncture, about a working relationship with those who were interested in 'tort reform'. In any event, she was eventually discharged by the Chronicle and now works for a newspaper out of Houston.

"However, during late 1985, and all of 1986 and 1987, this hysterical,

frenzied and emotional attack in the press continued. I have been told that the insurance company and large company interests, who were behind the effort for 'tort reform', had used this tactic in places other than Texas and were now using it in Texas, i.e attacking personally some of the more highly visible members of the Plaintiffs' Bar. This was, I was told, part of their strategy of generating animosity toward plaintiff lawyers generally, to help them with their lobbying effort with the Texas Legislature and other legislatures around the country. I was told that there were some relationships between members of the Grievance Committee (through law firms and their chemical company - insurance company clients) and some of the people supervising the 'tort reform' crusade and that there might have even been some financial contributions from those sources to help pay for the 'special prosecution' of myself, O'Quinn and Schwartz. In any event, the trial-in-the-press was highly damaging to me. Soon the Committee 4-C hired a Special Prosecutor, Tom Alexander, and so far as I know, this was the first time in the history of the Texas Bar Association that such a step was taken. The peculiar thing about the situation was that Mr. Alexander was hired to prosecute only myself, John O'Quinn and Newton Schwartz. It so happened, and I so state, that it was not coincidental that we were the only three lawyers prosecuted and also the only three Texas lawyers on the Agent Orange Plaintiffs Management Committee, which was a committee of nine people from across the United States who were charged with the responsibility of prosecuting the massive Agent Orange

litigation in Brooklyn, New York. Many people have intimated that there was a connection between the vendetta being undertaken by Committee 4-C and the fact that I had been involved in the Agent Orange litigation. Indeed, there have some stories written in the press, engineered by Committee 4-C and Bonnie Britt, which indicated that we were being prosecuted because of Agent Orange. I hereby state that all of the Agent Orange cases came to me through a very legitimate and longstanding organization called 'Citizen Soldier' and their General Counsel, Mr. Tod Ensign, or properly from other attorneys or people who had read about my participation in the Agent Orange litigation "In any event, the vendetta was off to a very vicious start and continued throughout 1986 and 1987. Because of the way in which Committee 4-C and the State Bar was conducting their investigation and their trial of myself in the press, I, as O'Quinn had done before me, filed a Motion with the Disciplinary Review Committee, requesting that they transfer the venue of my case from Committee 4-C to Committee 4-A or another appropriate committee. O'Quinn had filed such a Motion and it had been granted by the DRC. But when I filed my Motion, no action was taken and it was apparently just ignored by the Committee, at least until Committee 4-C filed a disciplinary petition against me. I thereby was deprived of my Due Process right to have my motion to transfer considered and passed upon by the DRC. John O'Quinn was accorded that right but, without explanation, I was not. In any event, Franklin Jones Jr. testified that with regard to my motion for change of venue from one

committee to another, and with regard to Newton Schwartz's motion, he had secured from Mr. Steven Peterson, General Counsel, the agreement that Committee 4-C in Houston would not do anything until those Motions were disposed of by the Disciplinary Review Committee. However, without the Disciplinary Review Committee having acted, thus depriving me of my of Due Process right to have the DRC act in connection with my request, Committee 4-C reneged upon the commitment of Steve Peterson to Mr. Jones and filed suit before the DRC had time to act. This is but one of many, many Due Process violations inflicted upon me.

"As the record in this case indicates, the suit involving the 'neglect' or 'telephone call' complaints (Barham, Merritt, Jenkins and Yorktown) was filed first and the suit involving 'solicitation and fee splitting' was filed later and the two suits were consolidated by agreement between myself and the State Bar. I wanted to avoid the expense, which I could not afford, of more than one trial. We also agreed that the trial on all counts would be set for November 7, 1987. And then I later found out that O'Quinn, through David Berg, his attorney, had negotiated a settlement with the State Bar whereby he would accept a public reprimand and testify against me and Schwartz. The matter was kept secret until it finally came out in connection with some of O'Quinn's motions. Tom Alexander, when he became Special Prosecutor, objected to the settlement with O'Quinn and thus got it stopped for the time being. Then O'Quinn launched an attack upon Tom Alexander and through

various motions and efforts made in the State Court of Appeals was able to get the prosecution of himself stayed pending the resolution of whether or not Tom Alexander had authority, under the law, to be a Special Prosecutor in a disciplinary case. Moreover, many members of the State Bar Executive Committee began to complain about the tactics of Committee 4-C, Alexander and the General Counsel's office, particularly because of the manner in which they were engaging in 'trial-in-the-press' tactics and what they called the 'vigilante' tactics of a 'run-a-way' prosecutor. In any event, because of the pressure and criticism, Mr. Alexander was eventually forced to resign in October of 1987, just about two weeks before my trial was scheduled. Up until that time, things were in limbo because of the uncertainly of the status of Alexander and it had been impossible to engage in any further discovery until that matter was straightened out. For example, I had wanted to take the depositions of all so-called alleged 'runners' and the depositions of Mrs. Jenkins and Mr. Settle of Yorktown, but because of Mr Alexander's uncertain situation, such discovery was not possible. When Mr. Alexander resigned, I felt certain that the State Bar would want to agree to postpone the trial until we could all complete our discovery, but then I found out that they wanted to go ahead and force me to trial. And Judge Casseb indicated that he was going to make me go to trial on November 7th as scheduled. Because of the Alexander matter, we filed a Motion For Continuance asking for the case to be postponed so that we

could complete our discovery and be prepared for trial. Judge Casseb, of course, as he did with all Motions which we filed, summarily denied the motion. Then the State Bar announced that it was not going to be ready in the 'solicitation' case and asked the Court to re-sever the 'neglect' cases off from the 'solicitation' case; grant the State Bar a continuance as to the 'solicitation' cases; and put me to trial in the 'neglect' cases. I vehemently opposed this effort because, now that Judge Casseb had denied my Motion for Continuance, I wanted to have the whole case tried and get it over with. Granting the State Bar's Motion to Continue the Solicitation case was not only hypocritical (denying mine and granting their's) but it had the effect of letting the State Bar off the hook with regard to a case they would never be ready to try and it forced me to the expense of defending myself in two trials rather than one, an expense I could not afford. Judge Casseb, though denying the relief I wanted, of course granted the relief that the State Bar wanted and allowed the reseverance, continuance to the State Bar on the solicitation cases and forced me to go ahead and go to trial on the neglect cases.

Most important, facing a jury trial, I filed a Motion To Transfer Venue because of all the adverse publicity. In this connection I verify that all the articles attached as Appendix E, in the Appendices, and all the other Appendices to the Supplemental Brief for that matter, are authentic copies of articles that were in the press on the dates indicated and the newspapers indicated and all other documents are

official documents, are part of my business records, and are authentic within the sense of the Business Records Rules of evidence. There is no question that Judge Casseb, since the trial I was facing was going to be a jury trial, should have changed the venue. At the very least he should have granted our Motion to allow us to question each of the members of the Jury Panel separately on the question of publicity.. To force us to question each member of the Panel in front of other members of the Panel on that issue was unconscionable. But, that he did - that is he denied our Motion for Change of Venue and denied our Motion to allow us to question each of the Jurors separately on the question of publicity. I testified at the about the financial problems I was having at that time, which has been caused by my participation in the Agent Orange case. Since that case was tentatively settled following three years of devoting almost all of my time to that case in New York and it had become obvious that Judge Weinstein was going to drastically cut the fees for all of the members of the Agent Orange Plaintiffs Management Committee, I was in a financial crisis. It had became apparent that I had lost about a million and a half dollars in terms of time and over $200,000.00 in out of pocket expense money. I was therefore forced to file for Bankruptcy in 1985 with regard to myself and at a later time I filed for a Chapter 11 with regard my professional corporation. Moreover, my family had been pressing me to try to put the Barmatter behind me. The Bar had been on my back for over twelve years, and every time I turned around they were after me,

primarily because of my modus operandi to engage in press conferences in connection with highly controversial, high visibility, mass disaster litigation. I recognize that my modus operandi is not popular with the so-called 'establishment' in the plaintiffs' Bar. And it is certainly not popular with the powers-that-be in the large law firms. But it is proper and ethical. What we would do is to accept clients in mass disasters and toxic tort litigation only from lawyers, legitimate organizations or other proper sources. I would, generally several days after the disaster or event had occurred, hold press conferences in connection with them, so that all victims and their personal attorneys would understand their potential rights. This was particularly important in foreign mass disasters where a lot of uncertainty usually existed with regard to American jurisdiction. In those press conferences we would always make it clear that we were taking cases only through the local Solicitors or lawyers or legitimate organizations who represented victims and lived in that vicinity. For example, modus operandi was employed in connection with the Agent Orange, Mexicana aircrash, PCB cases, Liberty Waste Dumpsite cases and Ocean Ranger disasters, as well as eventually the Piper Alpha disaster. In any event, as I was saying, my family was tired of the unremitting fight with the State Bar and wanted me to get it behind me. Moreover, I had a lot of important cases coming up in the Spring of 1988. This included my upcoming argument before the Supreme Court of the United States in the case of Chick Kam Choo

vs. Exxon and a number of other cases that were scheduled to go trial. Therefore, in view of the harsh, unfair and incorrect rulings made by Judge Casseb concerning the Continuance, the Bar's Motion to split the trials up again, My Motion To Transfer Venue, My Motion to Question the Jurors Separately on the question of publicity, and all the other rulings; my financial situation; the personal desires of my family; and, most important of all, my desire to get back to representing my clients and to be able to spend my full time on their cases rather than defending myself against the State Bar, I decided to settle my case with the State Bar.

While I had this strong desire to settle the case for the reasons I have stated, I still would not have settled this case had I known what was really on the General Counsel's mind. There was nothing in the Settlement or the Agreed Judgment, executed to carry out the Settlement, which prevented me from engaging in the modus operandi I had been using all along, namely the use of press conferences with respect to cases which had come solely through attorneys, legitimate organizations or unions. There was nothing in the settlement or the Agreed Judgment which prevented me from traveling to foreign nations or near the scenes of mass disasters. There was nothing in the Settlement or the Agreed Judgment that prevented me from communicating, publicly, with other attorneys or using public communications that were targeted ultimately to other attorneys. There was nothing in the Settlement or Agreed Judgment that, in order to comply with the so-called Referral Clause, I could not accept a Power of

Attorney, and could only refer a case by telling the client about another attorney and that I could not work upon the case after I referred it to another attorney. There was nothing in the Settlement or the Agreed Judgment that indicated that I could not receive a fee for referring cases during the first year of the probation period. I hereby state, swear and affirm that if I thought that any of the foregoing matters were intended by the State Bar to constitute a restriction upon me during the three year probation period, I would not have accepted the probation nor would I have accepted the Agreed Judgment. I would have gone to trial, despite all the reasons I wanted to settle. I hereby state that I relied upon the fact that the Agreed Judgment and the Settlement, and the discussions between myself and Mr. Smoot, did not restrict me in those ways. I later found out, long after the Agreed Judgment was entered into, to my shock and amazement that what the General Counsel really intended was that I was not to hold any press conferences for any purposes. Had I known this, I certainly would not have agreed to a settlement which deprived me of my First Amendment rights in such a way. I was soon to learn what the State Bar really intended by the Agreed Judgment/Settlement - to put me in shear bondage and to strip me of all effective rights to practice law.

"When the Agreed Judgment was to be released and made public (on January 31, 1989) I scheduled a press conference so that I could minimize the damages to my standing in the profession. I wanted to make it clear that I had not admitted to any

specific act of unprofessional misconduct and that I was simply entering into a settlement, as do most civil litigants, to end the litigation and get the expense and the inconvenience of the litigation off my back. The day before the press conference, Steve Nicholas, a lawyer in San Antonio whom I had hired to help me get through the three year probation period, called me and said that Judge Casseb had made it clear to him that he didn't want me have a press conference concerning the Agreed Judgment. I was shocked by this. I didn't know what to do. I went back and re-read the Agreed Judgment and again saw that the Agreed Judgment did not restrict my right to have a press conference nor did it in any way restrict my First Amendment rights. Mr. Nicholas made it clear that if I went ahead and had the press conference, I was going to incur the wrath of Judge Casseb. There are a number of witnesses to all this, but, in any event,I finally decided to placate Judge Casseb by reducing my role in the press conference. I let my attorney, Ray Bass, conduct the press conference. This had the effect of lessening the effectiveness as to why I entered into the Agreed Judgment. This whole episode highly disturbed me.

"Not long thereafter, in connection with the filing of a new suit with regard to the rights of the Vietnam Veterans concerning their exposure to Agent Orange, I held a press conference in Washington, D. C. No sooner than I had participated in that press conference, Mr. Hampton was calling me and telling me that Steve Smoot of the General Counsel's office was all upset because I had held that press

conference. I explained to Mr. Hampton that there was nothing wrong with it; that we were simply announcing the filing of a new suit; that the case in question had been properly referred to Wayne Mansulla; and that I had in no way violated any of the terms of the probation. Little did I know that there was an undisclosed restriction upon me within the intention of the General Counsel's office and Judge Casseb that was not stated in the Agreed Judgment and that was that I was not to have press conferences for any purpose. Then came the press conference that I held in connection with the Piper Alpha matter. I have fully testified about how that came about. There is no need for me to repeat those matters in this particular Affidavit, except to say that I thought I was doing what was proper by having the Piper Alpha press conference, for three reasons:

1. I was making it clear that I was not to be associated with the so-called Bhopal Brigade, namely lawyers who would come into town in connection with a mass disaster and openly and blatantly solicit victims directly. I made it clear that I was not going to solicit any victim nor even discuss a potential case with any victim, but would discuss any potential litigation in Texas only with Solicitors who might have been employed by the victims.

2. I had been advised by a number of Scottish Solicitors with whom I had worked on other cases in the past, that they were concerned

about an effort on the part of a group Aberdeen Solicitors, working with another American law firm (SPEISER & KRAUSE), to forge through a group settlement for about 120,000.00 pounds per family. They wanted me to make it clear to all of the Solicitors who might be representing victims, that such settlement was too low compared to potential American values and to give some indication of what the potential American values might be.

3. A number of the Solicitors were still uncertain about the potential jurisdiction in Texas and in the United States. They had heard a lot about Piper vs. Reyno and its adverse impact upon potential jurisdiction in the United States. They did not quite fully understand the difference between state court forum non conveniens law and federal forum non conveniens law. Therefore, it was their suggestion that I make it clear to the Solicitors who might be handling these cases, by public communication, what the present status of Texas law was with regard to forum non conveniens and the possibility of retaining jurisdiction in the United States.

"For those reasons, I decided to have the press conference. The evidence demonstrating that I objected to the letter to the victims sent by Kelly Newman, asking that they have their Solicitors contact Kelly Newman, and to the ad that was run by Kelly

Newman, is contained in the Statement of Facts and I need not repeat all that evidence now. Suffice it to say, I did not transgress DR2-101 and everything I did and said in Scotland was fully protected by the First Amendment to the Constitution of the United States. The Bar complained about the fact that I did not, at the press conference, volunteer the fact that I was on probation, but the fact remains that at the very moment that that matter became material - that is when some Solicitor approached me about potential employment - I did make the full terms of my probation known to such Solicitor.

"In any event, the press conference in Aberdeen stirred up the most unbelievable, emotional, unprofessional and unreasonable response by the President of the State Bar, the General Counsel, the Assistant General Counsel, Hartley Hampton and all those who might have anything to do with my probation. I need not repeat all those statements in the press, or other actions, except to state that the articles from the press attached as appendices to the Supplemental Brief, as I have stated above, are accurate and authentic copies and they all demonstrate quite clearly that the State Bar, through Jim Sales, the President of the State Bar, Steve Peterson, the General Counsel, Steve Smoot, the AssistantGeneral Counsel and Hartley Hampton, the appointed Custodian, had obviously reached the foregone conclusion to have my probation revoked and have me suspended for three years. They had pre-judged the situation without knowing the true facts and the

revocation thereafter was just a formality.

"Incidentally, I should say that, in the meantime, Hartley Hampton, who had been appointed by the State Bar to review all of my cases and to advise the Court if any single one of cases had been improperly solicited, had, after nine months of having access to my files and the list of my cases, not reported to Judge Casseb one single case that had been improperly solicited. It could already be seen that the solicitation allegations were nothing but frivolous allegations and this confirmed that fact. This examination by Mr. Hampton included all cases, including those mentioned in all the press clippings about the solicitation investigation, such as Agent Orange, Arrow Air, Bhopal and the Dallas-Fort Worth air crash.

"Also it is my understanding, when I entered into the Agreed Judgment, that Hartley Hampton, the appointed Custodian, was to be a fair, impartial and non-adversarial Custodian. After the Aberdeen press conference, he jumped right in and became an advocate on behalf of the State Bar. This is demonstrated by the page sheets of the deposition covers and his conduct during the so-called 'investigation'. He became an overly aggressive advocate and one that was basing his whole thought about the case upon incorrect understandings of the law For example, he stated that I was way off-base to say that it was quite possible that a Texas State Court would apply Texas punitive damages law. This showed that he just simply did not understand the holding of the Supreme Court of Texas

in Duncan vs. Cessna, where it held that, because New Mexico did not permit a remedy in a certain situation, New Mexico would have no governmental interest in that issue, and, therefore, under Texas Conflicts of Law Rules, Texas would have the dominant interest and Texas law would thus apply. Obviously the same thing would be true of punitive damages; since Scotland had not recognized punitive damages, it would have no 'governmental interest' in that issue and Texas, which does recognize punitive damages, would have the dominant governmental interest in same. Therefore, a Texas state court would probably apply Texas punitive law.

"On the 13th day September, Peterson, Smoot, Hampton, et al, filed a suit to revoke my probation and have me suspended for three years. In a very shocking procedural maneuver, they had Judge Casseb, who readily agreed to do anything they asked, set the revocation trial (not just a 'hearing') on the merits of the revocation petition just six days later, on the 19th day of September, 1988. Though I protested vigorously by way of Motion for Continuance and other motions, that my due process rights were being brutally violated and that such lack of notice did not comply with the Texas Rules of Civil Procedure, Judge Casseb callously overruled my motion, proceeded with the trial of the revocation matter on its merits on the 19th day of September and allowed the State Bar - even though I had no lawyer at that time, had not been given the time to engage in discovery (as the Agreed Judgment said I would have the right to do) and could not possibly

have been ready for trial - to put on its case. Again, all the constitutional violations that Judge Casseb callously engaged in are a matter of record and I need not repeat them one by one.

"Another very important one is the fact that Judge Casseb overruled my Plea in Abatement, to abate proceedings until the State Bar complied with Secs. 10-23 of Article 10 of the State Bar Rules (which deal with requiring the State Bar to process all new allegations of violations of the Disciplinary Rules through the Grievance Committee and thence allow a trial by Jury). In any event, the trial was nothing more than a kangaroo court. Judge Casseb wasn't the least bit interested in what I had to say or what evidence I might put on. He did allow everything to come in (on the ground that there it was a judge-trial and not a jury trial and that it would be presumed that he would disregard any inadmissible evidence), but it was impossible to tell what he did consider or what he did not consider. All through the trial I kept challenging the State Bar and Judge Casseb about the State Bar's burden, namely that - in view of the fact that the three communications in question, namely the press release, the ad and the letter, all contained disclaimers that we would not talk to any victim, but only with lawyers or Solicitors about potential litigation in Texas - in order for the State Bar to get around the First Amendment of the Constitution the State Bar would be compelled to show that the Solicitors and lawyers of Scotland were so brain-dead and incompetent that they could

not 'reasonably verify' the statements that were contained in the press release, ad and letter. Despite these challenges, the State Bar made no effort to demonstrate a legitimate and permissible State interest in regulating the public statements of one lawyer directed to other lawyers. It became apparent during the trial that Judge Casseb did not really care one way or the other because he already knew what he was going to do. It was immaterial to him that there were severe and substantial constitutional issues involved. He made it clear that he was going to follow his interpretation of the State Bar Rules and the Constitution be damned. A reading of his Findings of Fact, entered after he reached his decision, demonstrates that he simply was not going to deal with the constitutional issues involved, particularly the issues concerning the First Amendment. I requested repeatedly, in both my First Requested Findings of Fact and Conclusions of Law, and in the Amended Findings of Fact and Conclusions of Law, that Judge Casseb address those issues and make findings with regard thereto. But he refused to do so as one can see that from his Findings of Fact and Conclusions of Law. In truth, he simply acted as if I didn't have a right to raise constitutional issues in a trial before him.

"In any event, Judge Casseb callously entered a Judgment of Revocation, even though there was absolutely no evidence to justify such revocation and he suspended me for the maximum time he could, for three years. And now with the passage of time, the

truth has finally come out. The State Bar, through General Counsel Steve Peterson, has admitted publicly (in his conference with the Grievance Committee as reported by The Texas Lawyer and the other newspapers) that really the State Bar could not make a case on the 'solicitation' allegations that had been made against myself and O'Quinn. The press clippings also demonstrated that Steve Peterson, as many predicted, had protected and coddled John O'Quinn all along. The deal that Steve Peterson had tried to make with David Berg, who represented John O'Quinn back in 1987, could, know that Berg and O'Quinn were able to get rid of Tom Alexander, finally be made and consummated. Though the allegations against John O'Quinn were much more serious than those made against Benton Musslewhite, he was let off with a public reprimand, a hundred hours of public service and a fine which, to him, was nothing more than pocket change. Mr. Alexander was certainly correct when he called it a 'wrist-slap'. However, I have to say that I am not upset about the fact that O'Quinn got such a light punishment insofar as justice in the case is concerned, because, after what I have seen about the frivolousness of my case, I can see that most probably the case against him was frivolous also. What I do complain about, is the disparity of treatment between myself and O'Quinn. Mr. Peterson finally admitted that one of the primary reasons for the disparity of treatment was that John O'Quinn had $3,000,000.00 and I didn't. This is consistent with my investigation of the lawyers who generally have had discipline imposed against them (as

reported by the Texas Bar Journal)- the great majority of them are solo practitioners who are not rich. I have never seen discipline imposed against a high ranking member of one of the major law firms. Obviously they control the grievance committees and they don't let any grievance against their people see the light of day. An example of this is Gloria Chaplin's complaint against Committee 4-C. Moreover, Steve Peterson wouldn't dare take on any of the major law firms, even though, as the Appendices to my Supplemental Brief reflect, there have been allegations of very serious misconduct made against high ranking partners in BAKER & BOTTS and FULBRIGHT & JAWORSKI and many of the major law firms even when they had a complaint (e.g. Gloria Chaplin). Although the State Bar instituted an 'investigation' and a vendetta against me for 'solicitation' without any client complaint about solicitation, they dared not to institute any kind of 'investigation' or 'complaint' against the powerful large law firms. Therefore, what is said by Mr. Harrington and others about pervasive discrimination inherent in the disciplinary system of Texas - in that it discriminates against solo practitioners and less wealthy lawyers - is certainly true.

"In any event, as this thing has come down to the bottom line, it is now clear that the State Bar made a 'sacred cows' out of Kelly Newman just as they had made one out of John O'Quinn, and others. They did not file any kind of suit, or even conduct an investigation against Kelly Newman,

even though Newman was much more heavily involved in the Piper Alpha matter than I was (he was equally involved in the press conference and he ran the ad and sent the letter over my objections, with only his name on them). The State Bar did not prosecute John O'Quinn because of the Piper Alpha situation, even though he financed Kelly Newman's trip to Scotland, consulted with him on a day-to-day basis, and agreed to accept referrals of all cases that we were consulted on, both from me and from Kelly Newman.

"And there is other very telling evidence of selective enforcement and violation of my Equal Protection rights. When the State Bar announced its so-called crusade against 'solicitation' and that it would be investigating 'eight or more Houston lawyers', it was well known in the community that there was a certain lawyer who engaged in rank ambulance chasing. He had cubby holes in his office, occupied by investigators operating in old police cars and radios that could pick up police calls concerning automobile accidents. The minute a call would be received they would go to the scene of the accident, take pictures and then use the old bait-and -switch routine of trying to sell the pictures to the victims, but eventually switching to suggesting that they hire the lawyer for whom they worked. I have been told directly by this lawyer, whom we will refer to as Mr. X, and by others, that he paid over $100,000.00 in legal fees to the same David Berg who represented Mr. O'Quinn. At the time Mr. Berg represented Mr. X, he was still Chairman of another grievance

committee. The allegations against Mr. X, although they constituted a clear case of 'rank ambulance chasing', were buried and never saw the light of day. Yet I am prosecuted simply because I dared to hold press conferences. I say to this Court, in this Affidavit, that the cases that I have received over the last 12 years, when I had been the most active in personal injury, foreign seamen and toxic tort litigation, all have come to me through lawyers, clients, legitimate organizations, labor unions, and other sources that are legitimate and proper. I have never, and I emphasize never, engaged in rank ambulance chasing such as that done by Mr. X. Yet I am the scapegoat, I am the sacrificial lamb and Mr. X, Kelly Newman , John O'Quinn and Newton Schwartz have received 'wrist-slaps' for their punishment, or no punishment at all, while I have received the maximum punishment of three years suspension

"I should mention that Newton Schwartz told me that, when he accepted the sixty day suspension, he was going to take a nice vacation and it would be all over with. Even though Mr. Schwartz had been accused of converting client funds to his own use and benefit, the State Bar did not insist upon a probation or any punishment other than the sixty day suspension. There is no question in my mind but that my equal protection rights have been grossly violated by the manner in which the State Bar has singled me out for maximum punishment and let other lawyers similarly situated, or against whom allegations were even worse, go scot free or get off with 'wrist-slap' punishments.

"Lastly, I should mention that another rank indication of selective prosecution is the fact that in App E-34 to Supplemental Brief, the Houston Chronicle reports that James McNeilly named 'at least eight other lawyers in addition to O'Quinn' for whom he had run cases. This evidence was contained in an affidavit procured by Mr. Alexander. I was not one of the other 'eight', despite what Mr. Alexander had stated in the same article, because it is undisputed that I have never met James McNeilly in my life and he has never done anything for me. In any event, whether I was one of the eight or not, why did the State Bar not prosecute the other eight named by McNeilly? Eight more 'sacred cows'

"I want to make one more thing clear. During the trial in the trial court, both before and after judgment, I desperately tried to get Judge Casseb to grant supersedeas of the suspension judgment, pending my appeal. He knew, the State Bar knew and everyone knew that the unconstitutional suspension of me pending appeal, was destroying my law practice and having devastating consequences upon me. The harm to me and the adverse impact upon my ability to re-open my practice after winning the appeal is one of day-to-day harm- each day of suspension that goes by makes it harder for me to re-open my practice once the suspension is voided and that harm is irreparable. I have no uate remedy at law, other than supersedeas, and this has been denied to me so far by Judge Casseb, the Court of Appeals and the Texas Supreme Court. Sec. 24 of Art. X is unconstitutional as written because, as argued by Mr.

Smoot, it provides for a 'blanket' ban on supersedeas and applies regardless of the circumstances. But, at the very last, it is unconstitutional as applied in this case. I was never accused of, or charged with, or convicted of a crime or act involving moral turpitude. I have never been accused of, or shown to be, a threat to my clients or the public, as defined in Sec. 22 of Art. X. Though reportedly challenged by me to do so in the trial court and the appellate courts, the State Bar has never offered one scintilla of evidence to show that there is any conceivable police-power reason or permissible state interest for suspending me pending appeal. Indeed, Judge Casseb and the State Bar conceded otherwise in the trial court, because the State Bar agreed and Judge Casseb so found, that it would be in the interests of my clients for my suspension to be deferred from the date of the suspension judgment, in November of 1988, to and through January 31 of 1989. Therefore, the taking of my license pending appeal is unconstitutional because there is no justifiable reason for doing so.

"One last thing should be mentioned. The Court of Appeals has twice refused my motion for expediting and accelerating my appeal. It is now almost ten months since the appeal was perfected and this case has not yet been set for oral argument. Based upon my many years experience in handling appeals, it would appear to me that by the time the appellate process on the merits is completed in the Court of Appeals, the Texas Supreme Court and the U. S. Supreme Court, at least 2

years of suspension will have gone by and, in view of my age, 58, and the passage of this amount of time, even though I will eventually win my appeal I will be a dead-duck as far as starting up again in the law practice. So, the State Bar will have gotten what it improperly has wanted all along - to get rid of Benton Musslewhite forever- by the unconstitutional application of Sec. 24."

/s/ Benton Musslewhite
BENTON MUSSLEWHITE

SUBSCRIBED AND SWORN to before me the undersigned on this the 11th day of September, 1989.

/s/ Jane Hayes____
NOTARY PUBLIC
Harris County
STATE OF TEXAS

My commission expires:
10/19/92

APPENDIX S-1

Law Office of Benton Musslewhite, Inc.
Counselors of Law
609 Fannin
Houston, TX 77002
713/222-2288

June 28, 1986

Mr. Wayne Mansula
Suite 700
2000 L. Street, N.W.
Washington, D.C. 20036

RE: Agent Orange Litigation

Dear Wayne:

I hereby refer to you the following clients involved in the new Agent Orange suit in the Texas State Courts: Charles E. Brown, Ronald Lee Hartman, et.al., Dawn Marie Inman, et.al., Gary Thomas and Shirley Thomas, Shirley Zaleweski, James Donald Deloatch, Joyce Imagene Deloatch, and Jamical Galloway.

In the terms of referral previously expressed in a telephone conversation, you will be the Case Manager.

As I further advised, all cheques

for subsequent fees should be made payable to my Conservator, Mr. Hartley Hampton of YOUNG & HAMPTON, of Houston, Texas. He should also be kept advised of any further developments pertaining to the clients.

Mr. Hampton will contact you shortly with the necessary forms and inform you of your duties as the Case Manager.

Sincerely,

/s/ Benton Musslewhite

Benton Musslewhite

BM/dm

APPENDIX S-2

ASHCRAFT & GEREL
Attorneys and Counselors of Law
Suite 700
2000 L Street, N.W.
Washington, D.C. 20006
July 8, 1988

Benton Musslewhite, Esq.
609 Fannin, Suite 517
HOuston, TX 77002

Re:Hartman, Brown, Inman, Thomas,
Zaleweski, Deloatch and Galloway

Dear Benton:

I am in receipt of your letter dated June 28, 1988 in regard to the above-captioned cases. Please be informed that I will be happy to work with you on these cases and it is my understanding from our recent telephone conversation that the only case that we will be pursuing at the present time will be the Ronald L. Hartman case that was filed on June 22, 1988 in Jefferson County, Texas. We will use this case as a test case before getting involved in litigation with the other cases.

Also, I will be looking forward to correspondence from Mr. Hampton so that we might work out the appropriate fee arrangement in these cases. It is my understanding that we will be allocating fees based on the amount of work that is performed by you and me in this matter. However, it might be appropriate to try to delineate a percentage at this time to be modified in case our contributions do not meet our anticipations.

I will look forward to discussing this matter further with Mr. Hampton.

Very truly yours,

/s/ Wayne M. Mansulla
Wayne M. Mansulla

WMM/mc

APPENDIX S-3

POWER OF ATTORNEY

I, the undersigned, have employed Wayne Mansulla of ASHCRAFT & GEREL, in Washington, D.C., by referral, from the LAW OFFICES OF BENTON MUSSLEWHITE, INC., to be my attorney(s) to prosecute and collect all claims and causes of action for personal injuries and/or damages sustained as a result of exposure to Agent Orange between December, 1967 and December, 1968. These claims and causes of action which occurred in Vietnam are asserted against Diamond Shamrock, et al.

I do authorize Wayne Mansulla of ASHCRAFT & GEREL, to act as my negotiator to file pleadings and appear in Courts of law on my behalf, and to perform any and all functions which to him may seem reasonably necessary in the prosecution of my claims and the

preservation of my rights.

In consideration of the said services rendered and to be rendered by the said Wayne Mansulla of ASHCRAFT & GEREL in the prosecution of my claim or cause of action, I hereby now set over and assign to Wayne Mansulla of ASHCRAFT & GEREL as an assignment with the undivided interest in said claims or cause of action as follows:

33-1/3% interest if settlement is made before suit is filed;

40% interest if collection or settlement is made after suit is filed;

5% additional interest if the suit is tried and judgment is entered therein, and the same is appealed to the appellate courts.

It is agreed that the costs of Court and reasonable expenditures made by Wayne Mansulla of ASHCRAFT & GEREL in

his handling of my claims and causes of action shall be refunded to him from my portion of said recovery or settlement. In the event there shall be more than one of the undersigned, the singular shall be taken to mean the plural.

It is also agreed that my claim or cause of action can be referred to any other attorney as may be deemed necessary by my attorney(s) for the purposes of joint-venturing said case.

Executed this the 2nd day of August, 1988.

/s/Katherine H. (Mrs. Ronald L.)Hartman

9602 Philmont Drive, Houston, TX 77010

APPENDIX T

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

Movant, the State Bar of Texas, moves the Court to revoke the probation os Benton Musslewhite, showing the Court:

I.

DISCIPLINARY JUDGMENT

A. On November 10, 1987, the Court called these disciplinary actions to

trial. Petitioners, the Grievance Committee for State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared counsel and by the District 4-C, Grievance Committee chairman, and Respondent, Benton MUsslewhite, appeared in person and by counsel. Counsel for Petitioners announced ready for trial. Counsel for Respondent announced not ready for trial. After the Court overruled Respondent's Motion Continuance along with various other dilatory motions, Respondent sought to enter into settlement negotiations. The Court permitted the parties to discuss prospective settlement. Thereafter, the parties announced to the Court that they agreed to withdraw this disciplinary action from consideration by the Court, that they waived trial by jury, and that the Court should enter judgment pursuant to the agreement of the parties.

B. The Court signed a Judgment in conformity with the agreement of the parties, on January 29, 1988, providing, impertinent part:

IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days, beginning on November 1, 1989, and ending on January 30, 1989.

IT IS FURTHERED ORDERED that the Court may upon written request of Respondent showing good cause and with the recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.

. . .

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) year commencing on February 1, 1988 and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, Sec. 7;
2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential client to other attorneys:

. . .

II.

AGENT ORANGE SUIT

In April of 1988, Ronald L. Hartman and Katherine H. Hartman employed

Respondent to pursue claims resulting from Mr. Hartman's possible exposure to Agent Orange. Mrs. Hartman executed Power of Attorney on behalf of Mr. Hartman and herself employing the Law Officers of Benton Musslewhite, Inc. for such purpose. On June 22, 1988, Respondent filed a Plaintiff's original Petition in the 60th Judicial District Court of Jefferson County, Texas, under cause number B-129273, on behalf of Ronald L. Hartman and Katherine H. Hartman and as Next Friend of Jeffrey Alan Hartman and Angela Marie Hartman, Both Minors Individually and as Representatives of Those Similarly Situated". After the filing of the lawsuit, Respondent proceeded to conduct a news conference to announce his filing of a new so-called "Agent Orange" lawsuit. Respondent's acceptance of employment by the Hartman's and the class action

claimants violated the terms of probation.

III.

A. On July 6, 1988, the Piper Alpha oil platform located in the North Sea far of the coast of Aberdeen Scotland, exploded, killing or injuring some 166 men. After learning of the tragedy, Respondent contacted John O'Quinn, a Houston lawyer, about whether O'Quinn would handle any of the Piper Alpha cases in Texas courts, and Respondent states that O'Quinn agreed to accept cases procured by Respondent, O'Quinn, has stated that he had nothing to do with Musslewhite being in Scotland. Respondent also contacted Kelly Newman, also a Houston Lawyer, about going to Scotland with Respondent to seek Pipe Alpha clients, and Newman agreed to go in anticipation of securing clients and receiving a portion of any eventual attorneys' fees.

B. On July 15, 1988, Respondent and Newman called a news conference in Aberdeen, Scotland where they distributed a news release, a copy of which is attached hereto as Exhibit "1". The news release is false and misleading. The reference to a "team of internationally renowned Lawyers" is false or misleading because the release never identified these lawyers The statement that the team "would be working with U.K. Solicitors to represent victims or families of victims involved in the Piper Alpha tragedy" is false or misleading because it suggests that the team already had Piper Alpha clients. The description of Respondent as the "team:s lead counsel" is false or misleading because the release never discloses that the Judgment prevents Respondent from accepting new employment byu clients and that Respondent will be suspended

for ninety (90) days, and because Respondent's arrangement with O'Quinn was for O'Quinn to be lead counsel. The quote that the "team of attorneys I am leading are some of the best in the world at handling mass disaster litigation" is false or misleading because the release never identifies the lawyers, the releases never discloses that the Judgment prevents Respondent from accepting new employment by clients and that Respondent will be suspended for ninety (90) days, and the quote is a statement of opinion as to the quality of legal services. The release also fails to name the lawyers responsible for the performance of the legal services in the area of law broadcasted or to state "Not certified by the Texas Board of Legal Specialization".

C. Respondent and Newman thereafter took out an advertisement in the local

Aberdeen newspapers, a copy of which is attached hereto as Exhibit "2". The advertisement is false and misleading. Again, the reference to a "term of internationally renowned American Lawyers experienced in handling damage claims in mass disasters in the USA and Europe" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team "are now in Aberdeen" is false or misleading because Respondent, who is not named in the advertisement, had already left Aberdeen, O'Quinn never was in Aberdeen regarding Piper Alpha, and Newman, who is the only lawyer named in the advertisement, is in no fashion internationally renowned. The advertisement also fails to name the lawyers responsible for the performance for the performance of the

legal services in the area of law advertised or to state "Not certified by the Texas board of Legal Specialization".

2. Newman in concert with Respondent then mailed on behalf of the "team" form letters directly to the victims or their families, a copy of which is attached hereto as Exhibit "3". The letter is false and misleading. And again, the reference to a "group of internationally renowned trial lawyers in the United States" is false or misleading because it never identifies these lawyers and is not susceptible to reasonable verification by the public. The statement that the team is "currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages" is false or misleading because it suggests that team already had Piper Alpha

clients and because it is a prediction of future success. Furthermore, the Solicitors Practice Rules of 1987, a copy of which are attached hereto as Exhibit "4", which set out the ethical rules for Scottish lawyers with respect to advertising and solicitation, prohibit targeted, direct mail solicitation and would subject Respondent to discipline were he a Scottish solicitor.

Movant prays that the Court conduct an evidentiary hearing and thereafter determine whether Respondent has violated any terms of probation, and in which case enter an Order revoking probation and imposing suspension from the practice of law for three (3) years, and/or impose another additional terms, conditions, or length of probation the Court deems appropriate.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL

STATE BAR OF TEXAS
P. O. Box 12487
Austin, Texas 78711
512/463-1440

/s/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Revoke Probation has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fannin, Suite 517, Houston, Texas 77002, by hand deliver and by certified mail, return receipt requested, and regular mail, by depositing them in properly addressed and posted wrappers with the United States Postal Service on September 12, 1988.

/s Steven M. Smoot
Steven M. Smoot

APPENDIX T-1

EXHIBIT 1

NEWS RELEASE

FOR IMMEDIATE USE

Arberdeen - 15 July 1988. A team of internationally-renowned US lawyers based in Houston, Texas, revealed today that they would be working with UK solicitors to represent victims or families of victims involved in the Piper Alpha tragedy.

The team's lead counsel, Benton Musslewhite, has been extensively involved in mass disasters. These include the Ranger I disaster, Ocean Ranger sinking, Agent Orange litigation, Harris County Dumpsite cases and the Amarillo Cotton Farm disaster.

The defendants likely to be involved in Piper Alpha litigation all have their corporate headquarters in the US, with a

number of these being in Texas. This is significant because the Texas state courts are open to foreign as well as domestic plaintiffs and litigation pursued through state, rather than federal, courts is usually more successful.

Until recehtly, there had been some law to the effect that the state courts would have to apply the federal forum non conveniens law. However, a recent case before the US Supreme court won by Mr. Musslewhite means that Texas can retain its own jurisdiction when dealing with actions raised by foreign plaintiffs.

"The jurisdictional complexities and favorable punitive damages law make Texas the best place for suit to be filed by victims or victim's families of this tragedy," commented Mr. Musslewhite.

I would stress that my team will not accept any cases except through Scottish

or UK-based solicitors.

"The team of attorneys I am leading are some of the best in the world at handling mass disaster litigation and one of our hallmarks is that we work to obtain a recovery or a settlement on a separate, individual basis.

"We will not allow any packaging of settlements in group lots. The tragic aspect of packaging settlements, which has been customary in mass tragedies handled by some other attorneys, is that the persons with the greater damage are penalised for the benefit of those with lesser damages.

"It is our belief that each client's case stands on its own footing and the value of each client's case must be separately considered and finalised. I think this is important to clients."

Ends 15 July 1988

Issued on behalf of Benton Musslewhite

Inc by John Macdonald, PR Consultants Scotland. Tel 0224 325326 (office), 02224 311448 (home).

Further information: Kelly Newman
Tel: Aberdeen
(0224) 589101.

APPENDIX T-1
EXHIBIT 2

PIPER ALPHA DISASTER

DAMAGE CLAIMS

A team of internationally renowned American lawyers experienced in handling damage claims in mass disasters in the USA and Europe are now in Aberdeen and willing to talk to victims, families of victims and their solicitors in respect of claims arising from the Piper Alpha disaster.

Our team includes the attorneys who handled the recent case in which the US Supreme Court established the right of foreign plaintiffs to have jurisdiction in the state courts in America determined under state law rather than federal law and the attorney who obtained the largest verdict ever for one family in a wrongful death case

(over $50 million).

We believe the best courts for pursuing claims are the state courts of Texas and Louisiana, because we believe we can retain jurisdiction over cases in these courts and that the recoveries possible will be substantially higher and we can recover punitive, as well as actual damages in those courts. We believe the Piper Alpha disaster is one in which punitive, as well as actual, damages should be awarded.

We truly agree with the sentiments expressed by the offshore oilmen's unions that every possible step should be taken to guarantee the safety of workers' offshore. This can be achieved partly through union recognition, but also through the pursuit of punitive damage claims which will force oil multinationals to adopt stronger safety measures.

We understand that the Scottish Law Society has warned against directly employing U. S. attorneys and our team agrees with those suggestions. It is our policy not to take any cases except through Scottish or U.K. solicitors. However, we understand that there has been a suggestion by some Scottish solicitors that only one American law firm handle all cases. We respectfully suggest that it is not in the interest of victims or their families to pool all cases into one American firm, any more than it would be good to pool all cases into one U.K. firm.

There has been a trend among some American Attorneys to package cases for settlement purposes. We do not believe this is a good practice. Packaging cases means that the better cases are penalized for the benefit of the less

valuable cases. We believe it is our solemn duty to see to it that each case is settled separately, on an individual basis and not packaged for settlement purposes, as so many other American firms are prone to do. Therefore, we respectfully suggest it is in your interest to have your solicitor call us immediately or that you call us immediately and give us the name, address and phone number of your solicitor or the solicitor you propose to employ. The call should be made to Kelly Newman, Aberdeen 589101 (Room 215), Imperial Hotel, Surling Street, Aberdeen). Please leave your name and telephone number if for any reason I am not there or my line is busy.

Kelly Newman

of Houston Texas

APPENDIX T-1
EXHIBIT 3

LAW OFFICES
OF
KELLY L. NEWMAN
ATTORNEY AT LAW
350 North Belt Suite 234
Houston, Texas 77060
(713) 448-1173

July 18, 1988

All Victims or Familes of Victims of the Occidental Petroleum Platform Disaster

I am an American attorney and I represent a group of internationally renowned trial lawyers in the United States. We are currently having discussions with a number of U.K. solicitors with a view to filing suit in the state court of Texas to obtain maximum damages for the victims and/or their families.

I know you have seen a great deal of publicity about American lawyers and that you have been advised by your own solicitor or lawyer. We agree with that advice and we will not accept any

cases except through your own solicitor or lawyer.

The purpose of this letter is to ask that if you have already retained a solicitor to let us know who that solicitor is so that we can discuss the suit that we are bringing in the United States with him. If you have not retained a solicitor then we would advise that you do so as a matter of urgency and ask him to contact us so that we can discuss the action in the United States.

I will be at the Imperial Hotel, Stirling Street, Aberdeen (tel: 0224 589101) for all of this week. If for any reason you have not retained a solicitor until after I leave Scotland, please call me at my office in Houston, Texas (tel: (713) 448 1173).

With kind regards,

/S/ Kelly

Kelly Newm

ewman
n

APPENDIX T-2

STATE BAR OF TEXAS

September 13, 1988

Mr. Ray Hardy
District Clerk
P. O. Box 4651
Houston, Texas 77210

RE: Cause No. 86-44452; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 270th Judicial District of Harris County, Texas

Cause No. 87-24402; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 151st Judicial District Court of Harris County, Texas

Dear Mr. Hardy:

Enclosed for filing in connection with the above referenced matter is the Notice of Oral Hearing.

Please acknowledge the filing of the enclosed instrument by file stamping the additional copy of this letter enclosed and kindly return the copy and

filing receipt to the undersigned.

By copy of this letter copies of the enclosed are being provided to all counsels of record.

Thank you for your cooperation and assistance in this matter.

Sincerely,

/S/ Steven M. Smoot
Steven M. Smoot
First Assistant General Counsel

SMS:rm
Enclosures

cc: Mr. Benton Musslewhite (CMRRR #P818 815 867) and Hand Delivery
Mr. Hartley Hampton (CMRRR #P818 815 868) and Hand Delivery

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Oral Hearing has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fanmnin, Suite 517, Houston, Texas 77002, by hand delivery and by certified mail, return receipt requested, and also has been served on Hartley Hampton by delivery of a true copy to him at 1301 McKinney, Suite 3400, Houston, Texas 77010, by hand delivery and by certified mail, return receipt requested, by depositing them in properly addressed and posted wrappers with the United States Postal Service, on September 13 , 1988.

/S/ Steven M. Smoot
Steven M. Smoot

STATE BAR OF TEXAS

FILED
RAY HARDY DIST. CLERK
HARRIS COUNTY, TEXAS
1988 SEP 13 PM 3:04

September 13, 1988

Mr. Ray Hardy
District Clerk
P.O. Box 4651
Houston, Texas 77210

RE: Cause No. 86-44452; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 270th Judicial District Court of Harris County, Texas

Cause No. 87-24402; The State Bar of Texas v. Benton Musslewhite (Consolidated); in the 151st Judicial District Court of Harris County, Texas

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Steven M. Smook
First Assistant General Counsel

SMS:rm
Enclosures

cc: Mr. Benton Musslewhite (CMRRR #P818 815 867) and Hand Delivery
Mr. Hartley Hampton (CMRRR #P818 815 868) and Hand Delivery

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Oral Hearing has been served on Benton Musslewhite by delivery of a true copy to him at 609 Fannin, Suite 517, Houston, Texas 77002, by hand delivery and by certified mail, return receipt requested, and also has been served on Hartley Hampton by delivery of a true copy to him at 1301 McKinney, Suite 3400, Houston, Texas 77010, by hand delivery and by certified mail, return receipt requested, by depositing them in properly addressed and posted wrappers with the United States Postal Service, on SEPTEMBER 13, 1988.

Steven M. Smoot

APPENDIX T-3

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT OF
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL
	[]	DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL
	[]	DISTRICT

NOTICE OF ORAL HEARING

TO: Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002

PLEASE TAKE NOTE that hearing has been set on Petitioner's Motion to Revoke Probation and will be held before the Honorable Solomon Casseb on Monday, the 19th day of September, 1988, at 9:00 o'clock a.m. in the court room of the 270th Judicial District Court or such

other court room as may be designated by the Judge presiding.

Respectively submitted,

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
P. O. Box 12487

Austin, Texas 78711
(512) 463-1440

/S/ Steven M. Smoot

Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

APP. T.B

NO. 86-44452 (CONSOLIDATED)

HE STATE BAR OF TEXAS	§	IN THE DISTRICT COURT OF
.	§	HARRIS COUNTY, T E X A S
ENTON MUSSLEWHITE	§	270TH JUDICIAL DISTRICT

FILED
MAY MUNDY DISTRICT CLERK
HARRIS COUNTY, TEXAS
1988 SEP 13 PM 4:04
BY Deputy

NO. 87-24402 (CONSOLIDATED)

HE STATE BAR OF TEXAS	§	IN THE DISTRICT COURT OF
.	§	HARRIS COUNTY, T E X A S
ENTON MUSSLEWHITE	§	151ST JUDICIAL DISTRICT

NOTICE OF ORAL HEARING

O: Benton Musslewhite, 609 Fannin, Suite 517, Houston, Texas 77002

PLEASE TAKE NOTE that hearing has been set on Petitioner's otion to Revoke Probation and will be held before the Honorable olomon Casseb on Monday, the 19th day of September, 1988, at 9:00 'clock a.m. in the court room of the 270th Judicial District Court r such other court room as may be designated by the Judge presiding.

Respectfully submitted,

OFFICE OF THE GENERAL COUNSEL
STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711
(512) 463-1440

Steven M. Smoot
First Assistant General Counsel
State Bar Card No. 18774300

APPENDIX U

(Excerpts from)

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
V.	[]	HARRIS COUNTY, TEXAS
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

SECOND AMENDED MOTION FOR CONTINUANCE AND/OR ADJOURNMENT WITH RESPECT TO MOVANT'S MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Respondent, BENTON MUSSLEWHITE, and moves the Court for a continuance and/or in the alternative for an Adjournment and for such Motion would respectfully show the Court as follows, to-wit:

I.

The Notice of Hearing on the Movant's "Motion To Revoke Probation" was not served upon the Respondent until September 13, 1988 for a hearing on September 19, 1988. The time period between the date of notice of such hearing and the date of such hearing is not sufficient to enable the Respondent to properly prepare and defend himself with respect to the Motion To Revoke his probation. Such notice is not adequate; such notice is not reasonable; such notice does not comport with the standards of due process and is in violation of the Constitution of the United State, including the Fourteen Amendment, and the Constitution of the State of Texas. While the Disciplinary Judgment referred to in the Motion requires that a hearing be conducted within forty-

five (45) days, there is nothing in said judgment, nor could there be, which could provide for a suspension of due process protections for the Respondent and/or for the requirement that he be given reasonable notice of any hearing on a "Motion To Revoke Probation". Three (3) working days notice with respect to such a serious Motion cannot possibly be conceived of, in any court in the land, as reasonable and adequate notice.

. . .

III.

Moreover, the allegations contained in the "Motion To Revoke Probation" necessitates discovery far beyond the depositions that have already been taken. The Disciplinary Judgment specifically provides that, if the Movant should attempt to revoke probation, Respondent would have the right of discovery and all other rights

accorded an adversary party in court proceedings in Texas (with the exception of the right of trial by jury). Accordingly, your undersigned counsel believes that it is absolutely necessary that discovery be engaged in by Respondent so that the true facts can be developed and so that the rights of Respondent can be protected. As an example of the proper discovery, there is attached hereto as Exhibit A, a copy of Interrogatories and Requests for Production and Notices of Deposition concerning the development of the evidence relevant to allegations in the Motion to Revoke. These Interrogatories and Requests for Production and Notices of Depositions are reasonable undertakings that must be engaged in, in order for due process to be accorded Respondent and the terms of the Disciplinary Judgment does require that such rights be accorded

the Respondent. It is obvious that discovery cannot be accomplished in three (3) working days.

IV.

Pursuant to Rule 252, Texas Rules of Civil Procedure, Respondent certifies that a number of relevant and material witnesses cannot possibly be available for the hearing on this Motion to Revoke now set for September 19, 1988. These witnesses include, but are not limited to: John McDonald, Tony Sandilands, and Brian Fitzgerald, all of Scotland; John O'Quinn, who is in trial in Wharton, Texas and will continue to be in trial for the next two weeks; various experts Respondent may wish to call with respect to Scottish law; and Katherina Hartman, who will be in California all of next week.

V.

In addition, Respondent's counsel,

Ray Bass, is presently in trial in Williamson County, Texas in a criminal case which will continue into the week of the 19th and he cannot possibly be present for any hearing on the 19th. As long as the hearing was going to be simply an evidentiary hearing, counsel had not deemed it necessary to attend, but since the Movant, upon three (3) working days notice, has now, in clear disregard for due process rights and the terms and provisions of the Disciplinary Judgment (e.g., allowing the Respondent a reasonable chance for discovery) converted such hearing into a hearing upon a "Motion To Revoke Probation", it is quite clear that the undersigned counsel must be present in order to protect Respondent's rights and that Respondent is clearly, under the laws of Texas and of the United States, entitled to have his counsel present for such a serious hearing.

And, as undersigned counsel now certifies, he cannot possibly be present on September 19, upon such short notice because of the fact that he is in trial in Williamson County, Texas in a criminal case, which is definitely going to continue into next week.

VI.

In addition, the Respondent himself has been unable to take any steps to prepare, even if he had received more than three (3) days notice before the hearing, which he did not, because he has been in trial in the case of Pollock v. Vickers & Vickers, Inc., in the 295th Judicial District Court of Harris County, Texas, and that trial was, just yesterday, completed. Because of the time consumed in that trial, the Respondent has not had sufficient time to work with Respondent's counsel in order to

prepare for a serious Motion, such as the "Motion To Revoke Probation".

VII.

In sum, neither the Respondent nor Respondent's counsel has had enough time, nor are being given enough time to prepare , to defend against the Motion To Revoke Probation filed by Respondent. Nor was the notice sufficient time so that counsel for Respondent, Mr. Ray Bass, could be present. Nor is Respondent being given enough time to engage in material discovery. Nor is he being given enough time to depose important material witnesses, and, in addition, neither can the material witnesses appear on time. Therefore, for all the foregoing reasons stated above, there clearly exists good cause for a continuance of this case to a time, to be re-set by the Court, which will be convenient to the Court and the parties

and will give the Respondent sufficient time to engage in discovery and prepare to defend himself with respect to the Motion to Revoke.

VIII.

In the alternative and only in the alternative, if the Court denies the "Motion For Continuance", then without waiving the right to complain about the failure to grant such "Motion for Continuance", Respondent requests the Court, at the very least, to adjourn the hearing on September 19, 1988 to a later time, in order to give the Respondent sufficient time to develop discovery and prepare to defend himself, so that the Respondent can complete discovery and present Respondent's side of the case and thus due process can be accomplished.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Court to continue this cause from the setting of

September 19, 1988, with respect to the Movant's "Motion To Revoke Probation" and/or, in the alternative and only in the alternative, to adjourn the setting to a later time so that discovery can be engaged in and Respondent can prepare for a hearing upon the Motion To Revoke.

Respectfully submitted,

/s/ Ray Bass by permission
RAY BASS
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
TBA #01884000
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 16th day of September, 1988.

/s/ Ray Bass by permission
RAY BASS

APPENDIX V

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT COURT OF
	[]	
V.	[]	HARRIS COUNTY, TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

RESPONDENT'S ORIGINAL ANSWER
AND OPPOSITION TO MOTION TO REVOKE
PROBATION FILED BY MOVANT
THE STATE BAR OF TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Respondent in response and in answer to the Motion to Revoke Probation filed by Movant, the State Bar of Texas, and would respectfully show the Court, the following, to-wit:

I.

Plea in Abatement

A. Plaintiff hereby moves to abate all allegations under paragraph Roman Numeral III entitled Piper Alpha Tragedy", including subparagraphs A,B,C, and D, and would respectfully show that the Agreed Judgment entered by this Court January 29, 1988 (hereinafter referred to as "Agreed Judgment"), does not, and could not, in any way with respect to any new allegations of professional misconduct on the part of Respondent, waive or obviate the requirements contained in the State Bar Rules, the Texas Code of Professional Responsibility and the Disciplinary Rules, including, but not limited to Sections 10, 11, 14, and 16, to the effect that Respondent, with respect to any new allegations of misconduct, is entitled to a complaint

being filed with the Grievance Committee; a screening of such complaint by the Grievance Committee; if appropriate, an investigation by counsel for the Grievance Committee; notice to the Respondent from the Grievance Committee that "he is the subject of an investigation"; delivery to Respondent of a copy of the allegations against him, with the request that he respond in writing to the Grievance Committee; a decision by the Grievance Committee as to whether the matter should be classified as a complaint and then pursued to disposition, or whether it should be rejected as a complaint; the conduct of an investigatory hearing, if the complaint is not rejected, with notice to Respondent of least twenty-five days prior to the conduction of such hearing; the allowance of Respondent to appear and testify at such hearing,

with his counsel, "to present evidence in his own behalf", and to appeal to the Review Committee, if Respondent is not satisfied with the ruling of the Grievance Committee; should the Grievance Committee reach an adverse decision, then service of such decision in the form of a judgment upon the Respondent; the right of nonacceptance by the Respondent with a right of trial De novo in a district court; the right of trial by jury in the district court on such new alleged misconduct, with the Petitioner having the burden of proving its case by a preponderance of the evidence; and all other rights accorded to the Respondent with respect to alleged new misconduct proceedings by the Texas Code of Professional Responsibility; the Disciplinary Rules; the State Bar Rules; the Texas Rules of Civil Procedure; the Statutes and Constitution of the State of Texas; and

the Constitution of the United States, particularly the Due Process Clause contained in the Fourteenth Amendment.

Once new misconduct is found against the Respondent and finding becomes final after Respondent has been furnished all of the foregoing due process protections, then, and only then, can the State Bar utilize such final judgment of new misconduct as a basis for revoking Respondent's probation in this cause. At that point - once the Motion To Revoke Probation on the basis of a final judgment with respect to the new misconduct has been filed - Respondent concedes that he would then only have the protections accorded him on pages 4, and 5 of the Agreed Judgment.

Therefore, since all of the allegations contained in Roman Numeral III entitled "Piper Alpha Tragedy" pertain to alleged new misconduct on

the part of Respondent, Respondent respectfully requests the Court to abate the Motion To Revoke on such grounds, until and unless, the State Bar of Texas complies with the requirements of Sections 10, 11, 14, and 16 of the Texas Code of Professional Responsibility, the State Bar Grievance Rules, the State Bar Rules, the Disciplinary Rules, the Texas Rules of Civil Procedure, the Statutes and Constitution of the State of Texas and the Fourteenth Amendment of the Constitution of the United States of America.

B. With respect to all allegations contained in the Motion To Revoke Probation, Respondent respectfully requests the Court to abate same, until, and unless the State Bar complies with the provisions of the Agreed Judgment on pages 4 and 5 thereof and with respect to due process

under the Constitution of Texas and of the United States, and particularly until Respondent has had the opportunity to "invoke the discovery provisions" of the Texas Rules of Civil Procedure. In this connection, Respondent would show that the Motion to Revoke Probation was not filed until Monday, September 12, 1988 and Respondent was not served with Notice of Hearing upon such Motion until Tuesday, September 13, 1988, with the hearing to be just three working days later, September 19, 1988. Respondent, upon receipt of such Notice, immediately instituted discovery with Notices of Depositions, Interrogatories and Requests for Production. Since the Rules require a minimum time for response or at least reasonable time for response to deposition, interrogatories and production discovery (see Rules 167, 168 and 200

of T.R.C.P.), and it is obvious that the time between the date that the State Bar filed its Motion to Revoke Probation and the date that it set such matter for hearing was far less than that time necessary to enable Respondent to conduct discovery pursuant to the Texas Rules of Civil Procedure. Since such right of discovery in a revocation proceeding is guaranteed to Respondent by paragraph 4, page 4 of the Agreed Judgment, we respectfully urge the Court to abate these proceedings until Respondent has been given the reasonable right of discovery guaranteed to him by the Agreed Judgment and due process.

. . .

/s/Ray Bass by permission
RAY BASS
P. O. Box 237
Austin, Texas 78767
(512) 478-2277
TBA #01884000
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail,, first class, postage prepaid on this the 20th day of September, 1988.

/s/Ray Bass by permission
RAY BASS

APPENDIX W

No. 86-44452 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE
	[]	DISTRICT
	[]	COURT
	[]	
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	270TH JUDICIAL
	[]	DISTRICT

NO. 87-24402 (Consolidated)

THE STATE BAR OF TEXAS	[]	IN THE DISTRICT
	[]	COURT
	[]	
	[]	OF
	[]	
V.	[]	HARRIS COUNTY,G
	[]	TEXAS
	[]	
BENTON MUSSLEWHITE	[]	151ST JUDICIAL DISTRICT

MOTION OF RESPONDENT PURSUANT TO RULE 47 (a), (h), (i), (j) AND (k) OF THE TEXAS RULES OF APPELLATE PROCEDURE FOR SETTING OF SECURITY AND SUSPENSION OF THE ENFORCEMENT OF JUDGMENT REVOKING PROBATION, PENDING APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Respondent BENTON

MUSSLEWHITE, and with respect to the above respestfully moves the Court as follows:

I.

Pursuant to Rule 47 (a), (h), (i), (j) and (k) of the Texas Rules of Appellate Procedure, Respondent would show that the Judgment Revoking Probation entered by this Court on November 21, 1988, is one involving "a subdivision of the State"; is one wherein "the judgment holder has no pecuniary interest in it and no monetary damages can be shown"; and therefore is the type of judgment wherein the Court should set "security" for the "suspension of enforcement" of said Judgment, in an "amount and type" which is reasonable and which is sufficient to secure the State Bar "if the appeal is not prosecuted with effect". See Rule 47 (h) of the Texas

Rules of Appellate Procedure.

II.

In connection with the foregoing, Respondent would show that Respondent has already filed an Appeal Bond with the Clerk and that the amount of the "security," pursuant to Rule 47 (h) should be nominal in view of the fact that the Judgment Revoking Probation does not call for the payment of money damages.

III.

Your Respondent would further show in connection with the foregoing that this Court has continuing jurisdiction to set such security deposit. See Rule 47 (k) of the Texas Rules of Appellate Procedure.

IV.

Pursuant to Rule 47 (i) of the Texas Rules of Appellate Procedure,

Respondent requests the Court to require a "deposit" in lieu of bond and order the Clerk to issue the certificate referred to in Rule 47 (i) of the Texas Rules of Appellate Procedure, upon the making of such deposit by Respondent.

V.

Pursuant to Rule 47 (j) of the Texas Rules of Appellate Procedure, Respondent requests the Court to order the Clerk to issue a writ of supersedeas suspending, pending appeal, the provisions of the Judgment Revoking Probation, including
provision ordering the suspension of Respondent's law license effective January 31, 1989.

VI.

Your Respondent would further show that Section 24, Article X of the State Bar Rules does not bar this Court from

granting the required supersedeas and or suspension of the terms of the Judgment Revoking Probation for the following reasons: (a) when Section 24, Article X of the State Bar Rules is construed in pari materia with Section 22, Article X of the State Bar Rules, the preclusion of supersedeas or the suspension portion of a judgment against an attorney should apply only where such attorney has been determined to be an immediate and irreparable threat to such attorney's clients and/or the public pursuant to the provisions of Section 22, Article X of the State Bar Rules. It is undisputed that the Bar has never requested, nor has the Court ever determined, that the Respondent is an immediate and irreparable threat to his clients and the public pursuant to Section 22, Article X of the State Bar Rules; (b)

in the alternative, if the Court refuses to construe Section 22, Article X of the State Bar Rules as suggested in (a) above, then Section 24, Article X of the State Bar Rules is unconstitutional as written and/or applied in that it violates the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. This is so because it calls for an unreasonable and unnecessary exercise of the State's police power with respect to Respondent's property, his license to practice law, by taking same pending appeal without any police power reason for doing so, in violation of the Fifth Amendment; constitutes an excessive fine or bail and unreasonable punishment in violation of the Eighth Amendment; and constitutes a violation of Respondent's rights under the Equal Protection and Due Process Rights under

the Fourteenth Amendment to the Constitution of the United States.

VII.

Your Respondent would show that it is crucial that the Court rule immediately, with shortened time for response, because the suspension date is rapidly approaching. In order to help expedite this matter Respondent agrees to a telephone presentation of this Motion by telephone conference call between the Court, counsel for the State Bar and himself.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Court for the relief requested above.

Respectfully submitted,

/S/
BENTON MUSSLEWHITE
1535 Mellie Esperson Bldg.
815 Walker Ave.
Houston, Texas 77002
713/222-2288
RESPONDENT PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 11th day of January, 1989.

/S/
BENTON MUSSLEWHITE

App. X-1
[Excerpts]

NO, 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

AMENDED OPPOSITION TO APPELLEE
THE STATE BAR OF TEXAS' MOTION TO EXTEND
TIME TO FILE APPELLEE'S BRIEF AND
RENEWAL OF MOTION UNDER RULE 100(g), T.R.A.P.

TO THE HONORABLE COURT OF APPEALS:

COMES NOW APPELLANT, Benton Musslewhite, and files his amended opposition to the Motion to Extend Time to File Appellee's Brief, filed by the State Bar of Texas, and in support would respectfully show unto this Honorable Court the following:

I.

Appellant's Brief was due on February 17, 1989. Appellant sought, and was granted, an extension of time to file such Brief, to and

through March 1, 1989, and the Court extended the time to and through March 6, 1989. Appellant's Brief was duly filed on such date, March 6. Thus, Appellant was granted an extension of time of a total of seventeen (17) days. Moreover, it is pertinent to note that Appellant's suspension commenced on January 31, 1989. Thus, the 90-day suspension referred to in the Agreed Judgment entered into between Appellant and the State Bar will be completed on May 1, 1989.

II.

The Appellee's Brief should be due on March 31, 1989. Now Appellee seeks an extension to and through May 30, 1989. This request is astounding, unjust and manifests a calloused indifference to the rights of members and former members of the State Bar of Texas.

***

IV.

Now, in the "unkindest cut of all", the State Bar, after spending thousands of dollars investigating and prosecuting the

Appellant, including the fruitless trip to Scotland, claims that it does not have enough money to hire sufficient attorneys to handle the appeal in a timely manner, so that, it claims, it must have sixty (60) extra days in which to prepare and file its Brief. What is so shockingly calloused about this request is that Appellee knows that the 90-day suspension period Appellant would have been required to accept, had it not been for the unjust revocation, will be completed on May 1, 1989 (90 days from January 31, 1989); the Appellee vigorously opposed all efforts of Appellant to have the district court defer suspension pending appeal on the merits; and now it indifferently seeks an extension that will carry the suspension at least thirty (30) days beyond the Agreed Judgment 90-day period (and obviously many days more because the oral argument wil have to be set after May 30th and then time thereafter will be needed for the Court to render its judgment). Since the Appellant will eventually win the appeal, the State Bar, by claiming to have an

inadequate staffed General Counsel's office, will, should this Court grant its requested extension, have been able to unjustly inflict upon the Appellant an additional 30 to 60 days of suspension, with devastating effect upon Appellant.

V.

Appellant, therefore, takes the following positions:

1. If the Appellee will agree, and work with Appellant, to procure an order of the district court or this Court (under Rule 49(b)) allowing supersedeas of the suspension provisions of Judge Casseb's Judgment Revoking Probation with the supersedeas to take effect on May 1, 1989 (which would be the end of the 90-day period of suspension that Appellant was required to serve even if he wins the appeal and the revocation is nullified), then Appellant has no objection to the Court granting the full extensin of 60 days requested by the Appellee.

2. But, absent such an agreement and

order (to grant Appellant supersedeas effective May 31, 1989), Appellant strenuously objects to the granting of any extension of time for Appellee in which to file its Brief which is in excess of the same period of time for which Appellant was given extension, namely 17 days.

VI.

The Appellee fails to state adequate and sufficient grounds for a 60-day extension (unless Appellee agrees to a supersedeas effective May 31, 1989), particularly in view of the fact that, should this Court grant the 60-day extension, the Appellant will suffer severe, irreparable harm beginning May 1, 1989, and in view of the further fact that the State Bar in this case, like the State of Texas in a criminal case, has the duty to exercise fairness and diligence toward those it prosecutes. The Appellee's Motion for Extension of Time demonstrates both a lack of fairness and lack of diligence. Why should Appellant be penalized with additional and unjust suspension time simply because the

State Bar, which found it had no shortage of money with which to investigate, persecute and harass the Appellant, now claims that it does not have sufficient staff with which to handle this appeal in a timely manner? Therefore, Appellant requests the Court to deny the Motion for Extension of Time of Appellee, except on the conditions stated under para. V. above.

VII.

Regardless of how the Court rules on the Appellee's Motion for Extension of Time, Appellant renews his request that the Court, pursuant to Rule 100(g), T.R.A.P., accelerate and advance this case upon the Court's docket for oral argument. Needless to say, every day that goes by after May 1, 1989, causes compounding, geometrically progressive harm to Appellant because of the suspension during this appeal. Therefore, time is of the essence and just cause exists for advancing this case upon the docket for Oral Argument in accordance with Rule 100(g).

WHEREFORE, PREMISES CONSIDERED, Appellant prays the Court to deny Appellee's Motion to Extend Time to File Appellee's Brief, except on the terms and conditions stated in para. V. above, and to advance this case upon the docket for Oral Argument.

Respectfully submitted,

/s/
Benton Musslewhite PRO SE
1535 Mellie Esperson Bldg.
815 Walker Avenue
Houston, Texas 77002
713/222-2288

APP. X-2

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 30, 1989

Hon. Benton Musslewhite
1535 Mellie Esperson
815 Walker
Houston, TX 77002

Hon. Linda Acevedo
State Bar of Texas
P. O. Box 12487
Capitol Station
Austin, TX 78711

RE: CASE NO. 14-89-00041-CV
TRIAL COURT CASE NO. 86-44452

STYLE: Musslewthie, Benton v.
The State Bar of Texas

Counsel:

Please be advised that on this date the Court GRANTED appellant's motion to extend time to file brief in the above cause; time extended to and including May 15, 1989 at noon.

Respectfully yours,

MARY JANE SMART, CLERK

By Charlene Mitchell
Deputy

App. Y
[Excerpts]

NO. 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

*

MOTION PURSUANT TO RULE 49(b) OF THE TEXAS RULES OF APPELLATE PROCEDURE FOR IMMEDIATE APPELLATE REVIEW OF THE DENIAL BY THE DISTRICT COURT OF APPELLANT'S RULE 47 MOTION REGARDING THE SETTING OF SECURITY FOR THE PURPOSES OF SUPERSEDEAS; A FURTHER MOTION FOR A TEMPORARY RESTRAINING ORDER, WITHOUT NOTICE, PENDING HEARING ON RULE 49(b) MOTION; AND APPELLANT'S MOTION FOR ACCELERATED APPEAL, SHORTENING OF TIME FOR FILING BRIEFS AND ADVANCEMENT OF CASE ON DOCKET FOR ARGUMENT, PURSUANT TO RULE 42(b), 74(n) AND 77(b)(6) OF THE TEXAS RULES OF APPELLATE PROCEDURE

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS OF THE FOURTEENTH SUPREME JUDICIAL DISTRICT:

COMES NOW BENTON MUSSLEWHITE, Appellant,

and moves the Court pursuant to Rule 49(b) of the Texas Rules of Appellate Procedure, to reverse the denial by the District Court of the Appellant's Rule 47 Motion, order that the District Court set security for supersedeas and mandate that, upon deposit of such security, the District Court order the District Clerk to issue a writ of supersedeas; further, comes the Appellant and moves the Court for a temporary restraining order, temporarily enjoining the enforcement of the suspension provisions of the Judgment of the Court below, pending a hearing upon Appellant's Rule 49(b) Motion; and further the Appellant requests the Court to accelerate the appeal of this case on the merits pursuant to Rule 42(b) of T.R.A.P., shorten the time for filing briefs pursuant to Rule 47(n), T.R.A.P., and advance the case upon the docket for oral argument and submission, pursuant to Rule 77(b)(6) T.R.A.P.; and for such Motions would respectfully show this Honorable Court as follows:

I.

The judgment from which appeal on the merits is being pursued was signed on November 21, 1988. Appeal was perfected in this Court on December 21, 1988. The Statement of Facts was filed January 18, 1989 and the Transcript was filed January 13, 1989. The Appellant's brief is presently due on February 17, 1989. Therefore, this Court has jurisdiction to entertain this Rule 49(b) Motion, submitted pursuant to the Texas Rules of Appellant Procedure.

II.

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3. Aside from prefecting appeal on the merits to this Court, Appellant filed a Rule 47 Motion (Rule 47, T.R.A.P.) requesting the District Court to set an amount of security deposit so that the Appellant, upon making such deposit, could secure a writ of supersedeas, superseding the suspension portion of the Judgment Revoking Probation. The District Court denied such Motion. The Rule 47 Motion and the District Court's order

denying same are attached hereto as Exhibits B and C. The purpose of this present Motion, filed pursuant to Rule 49(b), T.R.A.P., is to appeal the District Court's denial of the Rule 47 Motion and to request that this Court, after an expedited hearing as provided for in Rule 49(b), reverse the District Court's denial of the Rule 47 Motion; immediately remand the case to the District Court with instructions that the District Court set a security deposit; and mandate further that, upon such deposit being made, the District Court direct the District Clerk to issue a writ of supersedeas, superseding the Judgment Revoking Probation, pending the resolution of the appeal on the merits from that judgment.

4. In the Court below, it is now verified that it was undisputed that the State Bar did not offer any evidence to show that the Appellant was,in accordance with Section 22 of Article X of the State Bar Rules, an immediate and "irreparable threat of harm to his clients or potential clients". Moreover,

it is undisputed that Appellant has never been convicted of a "serious crime", as described in Section 26, Article X of the State Bar Rules. Indeed, the State Bar of Texas stipulated in open Court that it had no objection to the suspension being deferred so that the Appellant could take care of important client business. The Court below found, implicitly, that the Appellant was not "an immediate threat of substantial and irreparable harm to his clients or the public" because the Court, although it entered the Judgment Revoking Probation on November 21, 1988, delayed the activation of the suspension until January 31, 1989 so that the Appellant could take care of important client business. Obviously, the Court would not have done this if the Appellant had been "an immediate and substantial threat of irreparable harm ....

(B) If the Court does not construe Section 24 as asserted under "A" above, then the Court has no choice but to hold Section 24 unconstitutional because it violates the

Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3, 13 and 19 of the Texas Constitution, as written and/or as applied in this case.

Chester J. Antineau, in his Treatise, Modern Constitutional Law, the Individual and Government, states:

> The American Founding Fathers customarily believed in the doctrine of natural rights, and ordinarily included the property right in their listing of such rights. To some the right to own and possess property was not a "prime" natural right but rather a secondary right that society must honor and protect in order to more effectively ensure the basic natural rights to life and liberty.
>
> The United States Constitution and practically all state constitutions provide that a person shall not be deprived of his "property, without due process of law; nor shall private property be taken for public use, without just compensation..."
>
> The federal government, under the Fifth Amendment, and the states, under the Fourteenth, can regulate the use of private property whenever such regulation is reasonable and reasonably related to the public health, safety, morality or general welfare. It is ... unreasonable, arbitrary or capricious interference with the use of property that is unconstitutional.

Id. Vol. 2, Sect. 3:1, at p. 206; emphasis added. See the Fifth Amendment to the United

States Constitution and Article 1, Section 19 of the Texas Constitution.

There is no doubt but that the right and license to practice law constitutes a valuable property right. See *In Re Ruffalo, supra*, and *Sizemore v. State Bar of Dental Examiners, supra*. ....

The question thus arises as to whether or not Section 24 of Article X of the State Bar Rules, whch provides for a blanket suspension of an attorney pending his or her appeal from an order of suspension, is in some way "related to the public health, safety, morality or general welfare" to the extent that it is reasonable and not arbitrary and capricious. The answer to that issue is obvious. If the statute is construed as Judge Casseb has construed it, it provides for a blanket suspension, pending appeal, of all attorneys, regardless of whether or not there has been any showing that the suspension of the attorney in question, pending appeal, is necessary in the interest of the "public health, safety, morality or general welfare".

Another way of putting it, the police power gives the States and their subsidiary entities the right to take property in the exercise of that police power *only* where that exercise is reasonable and in some way related to a police power need - that is the exercise of such power must be such that it will constitute a substantial furtherance of the safety or general welfare of the people. If it does not meet these tests, then the statute is unconstitutional under the Fifth and Fourteenth Amendments, prohibiting the taking of property without due process of law; it violates the Fourteenth Amendment concerning substantive as well as procedural due process; it violates the Fourteenth Amendment concerning "Equal Protection of the Laws"; and it may, since it is a proceeding that is "quasi-criminal" in nature, ***Sizemore, supra***, violate the Eighth Amendment, as made applicable to the states through the Equal Protection and Due Process clauses of the Fourteenth Amendment, prohibiting "excessive bail ... and excessive fines. ....".

As the Supreme Court of the United States made it clear in the recent case of *Shapero*

v. Kentucky Bar Association, 100 L.Ed.2d 475 (1978), a state bar cannot take an attorney's property, namely his license and right to practice law, without violating the Constitution, unless and until such state bar has shown that it has a "substantial governmental interest" in taking such property right and that it is being taken "only through means that directly advance that interest". ....

Whether there is a "substantial governmental interest" in suspending Appellant during a bona fide appeal, or whether there are reasonable grounds for the exercise of the police power to take Appellant's license pending appeal, are "constitutional facts" which must be proven, clearly and precisely, by the party contendig that a particular statute or regulation is constitutional in

the face of a constitutional challenge. See *Antineau*, Vol. 2, at pp. 699-705. As Professor Antineau stated, "the reasonableness of all police power controls under both the Fifth and Fourteenth Amendments" is a matter that must be proven by the party asserting that a "control", such as a statute or regulation, is constitutional. ....

In the Court below the State Bar offered not a scintilla of evidence to establish that the right to suspend an attorney pending appeal, even though such attorney has not been shown to constitute an immediate and irreparable threat of harm to his clients, potential clients and the general public, has any reasonable relationship to "the public health, safety, morality or general welfare" or in any way constitutes a "substantial governmental interest", as defined by the Supreme Court in *Shapero*.

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IV.

In View Of the Commencement of Suspension on January 31, 1989, We Respectfully Submit

That the Court Should Grant a Temporary Restraining Order Pending the Setting of a Hearing, Conducting the Hearing and the Action of This Court on the Merits of the Rule 49(b) Motion.

Rule 49(b) provides that "the Appellate Court may issue such orders as it finds necessary to preserve the rights of the parties". The Supreme Court of Texas, in ***The State Bar of Texas v. Heard, supra,*** citing ***State v. Rogers***, 165 S.W.2d 81 (Tex.Sup.Ct., 1942), stated that equitable relief is appropriate to correct the action of a trial judge "where he acts in abuse of his discretion, or in violation of his clear duty under the law, and there is no adequate remedy by appeal" 603 S.W.2d at 834. In ***Heard***, the Supreme Court mandamused Judge Wyatt Heard to enter an order suspending the Respondent attorney because he had been convicted of a felony involving moral turpitude. Judge Heard had argued that mandamus, prohibition or injunction was not the proper remedy because the State Bar had

an adequate remedy, namely a regular appeal. However, the Supreme Court rejected Judge Heard's arguments and stated:

"This requirement would effectively repeal Sect. 16(a) of the State Bar Act, however, ***because the question of suspension would be rendered moot once Pruitt's appeal is decided.*** If his appeal was unsuccessful, his federal conviction would be final, and the trial court must disbar him. On the other hand, if Pruitt's appeal is successful and no other grounds exist that would require disbarment, the trial court must restore his license. ***In either case, the dispute over the suspension would be meaningless.***"

603 S.W.2d at 834; (emphasis ours). See also ***State Board of Medical Examiners v. Mann***, 413 S.W.2d 382 (Tex.Sup.Ct. 1967)(affirming issuance of equitable relief directing reissuance of license to practice medicine). Since the Appellant's suspension just commenced on January 31, 1989, in the same vein as the Supreme Court expressed itself in ***State Bar of Texas v. Heard***, this Court should grant a temporary restraining order, without notice, enjoining the enforcement of the suspension provisions of the Judgment Revoking Probation pending the hearing on the merits of the Rule 49(b) Motion. If the Court

does not grant the temporary restraining order, since the suspension just commenced on January 31, 1989, Appellant will suffer irreparable harm, as this Motion now verifies, because if the suspension continues very much longer most clients will be forced to make permanent changes in counsel and Appellant's law practice will be almost completely destroyed. Your Appellant now verifies that irreparable harm will be sustained by him absent the granting of the temporary relief now requested. Appellant will suffer the "day-to-day" harm described in ***Nebraska Press Assn. v. Stuart***, 423 U.S. 1327 (1975)(Blackmun, J., in chambers).

Moreover, as expostulated in ***The State Bar of Texas v. Heard*** and other cases such as ***State Board of Medical Examiners v. Mann***, it is clear that where the issue in question pertains to a matter that will become moot once the appellate process is completed, the only way the appellate court can provide a remedy of law is to enjoin the suspension during the duration of the appeal, so that

the issue can be preserved. This is precisely the purpose of the provision in Rule 49(b) that states that the "appellate court may issue such temporary orders it finds necessary to preserve the rights of the parties". The temporary restraining order we request is necessary in order for this Court to protect its jurisdiction to decide the issues raised in this Rule 49(b) Motion and "preserve the rights of the parties". It is also necessary to prevent irreparable harm.

Therefore, Appellant requests the Court to grant a temporary restraining order without notice, restraining the enforcement of the suspension provisions of the Judgment Revoking Probation, pending the resolution of this Motion on its merits at a hearing to be set "at the earliest possible time" as required by Rule 49(b).

V.

Appellant's Additional Motion for Accelerating the Appeal, Shortening the Time for Filing of Briefs, and Advancing the Case Upon the Docket for Oral Argument.

Pursuant to Rule 42(b), Rule 74(n), Rule 77(b)(6) of T.R.A.P., your Appellant requests the Court to accelerate this appeal in accordance with its discretion to do so; shorten the time for filing briefs, as hereinafter suggested; and advance the case upon the docket for presentation of argument and submission, all as provided by such Rules of Appellate Procedure.

As stated above, the suspension is scheduled to start on January 31, 1989. As further stated above, irreparable harm accumulates day-by-day and on a geometrically progressive basis. If the Court should grant the Rule 49(b) Motion, then this particular Motion will be unncessary. The reason for this Motion and why there is good cause for such Motion is that, if this Court should disagree with us about a proper construction of Section 24 Article X of the State Bar Rules and conclude that such Rule is *not* unconstitutional, and not allow us to supersede the suspension order pending appeal, then, at the very least, there is

good cause for granting this Motion to accelerate the appeal, shorten the time for filing briefs, and advance the case upon the docket for briefing and submission. Surely good cause exists in light of the harsh consequences of Section 24 of Article X of the State Bar Rules which would, should this Court not grant our requested Rule 49(b) relief, stand as a blanket suspension pending appeal even though, as in this case, the attorney in question has not been convicted of a crime of moral turpitude; has a probable chance of winning his appeal and thus vindicating himself on the appeal on the merits; and has not been found to be, pursuant to Section 22 of Article X of the State Bar Rules, an irreparable threat of harm to his clients or to the public.

Therefore, for all of the reasons stated in this Motion, this Motion being verified, Appellant would show that good cause exists for granting relief provided for under Rules 42(b), 74(n), and 77(b)(6) of the Texas Rules of Appellate Procedure. In that connection,

your Appellant hereby respectfully suggests the following schedule in order to expedite this appeal:

(A) Appellant's Brief be due on February 17, 1989, as presently scheduled.

(B) That Appellee's Brief be due on March 9,1989, which is towenty days thereafter.

(C) That the case be set for oral argument at the earliest possible date thereafter.

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Wherefore, your Appellant prays: (i) That the Court immediately issue a Temporary Restraining Order without Notice, based upon this verified Motion, enjoining the suspension of Appellant's license pending a hearing upon Appellant's Rule 49(b) Motion upon its merits. (ii) That, as required by Rule 49, the Court set an oral hearing upon Appellant's Rule 49(b) Motion, at the "earliest practical date", and that, upon such hearing, the Court grant the rief requested under Rule 49(b), namely that the action of the lower Court, in denying Appellant's Rule 47 Motion with respect to

the setting of security so that Appellant can supersede the Judgment of suspension, be reversed and the District Court ordered to set security and order the Clerk to issue Writ of Supersedeas upon deposit of such security within a reasonable time. And (iii) in the event the Court determines not to grant Rule 49(b) relief, that the Court shorten the time for filing briefs, accelerate the appeal, and advance the case upon the docket for oral argument and submission, all as provided for by Rule 42(b), 74(n), 77(b)(6) of T.R.A.P.

Respectfully submitted,

/s/
Benton Musslewhite PRO SE
1535 Mellie Esperson bldg.
815 Walker Ave.
Houston, Texas
713/222-2288

APPENDIX Z

NO. _____

IN THE SUPREME COURT OF TEXAS

*

BENTON MUSSLEWHITE,

Relator,

versus

THE HONORABLE SOLOMON CASSEB,
Presiding Judge of the
270th Judicial District
Harris County, Texas,

Respondent,

and

THE STATE BAR OF TEXAS,
Real Party in Interest,
Also Respondent.

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ORIGINAL PROCEEDING, RELATOR'S THIRD PETITION FOR WRIT OF MANDAMUS, PROHIBITION AND/OR INJUNCTION PURSUANT TO RULE 121 T.R.A.P.

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES BENTON MUSSLEWHITE, Relator, complaining of THE HONORABLE SOLOMON CASSEB, Presiding Judge of the 270th

Judicial District of Harris County, Texas, Respondent, and THE STATE BAR OF TEXAS, Real Party-in-Interest, and, for the third time, seeks a Writ of Mandamus, Prohibition and/or Injunction, and for such Petition would respectfully show the Court:

I.

PARTIES

A. The Relator is: Benton Musslewhite, 1535 Mellie Esperson Bldg., 815 Walker Avenue, Houston, Texas 77002, Texas Bar Association No. 14752000.

B. The Primary Respondent is: The Honorable Solomon Casseb, Presiding Judge of the 270th Judicial District Court of Harris County, Texas, 127 East Travis, San Antonio, Texas, 78205.

C. The Real Party-in-Interest is: The State Bar of Texas, State Bar Bldg., Capitol Station, Austin, Texas, 78711.

II.

BRIEF PRELIMINARY EXPLANATION

Relator has sought leave to file a writ of mandamus, etc. on two prior occasions. But the procedural posture of the case was significantly different in both of those instances. The first was presented before Judge Casseb had entered the final Judgment Revoking Probation. The second was presented before Relator presented his motion pursuant to Rule 49(b), T.R.A.P., to the Court of Appeals and before the Court of Appeals had denied the motion. This Petition is being presented after all of the foregoing events have taken place and in a posture wherein all possible remedies below have been fully exhausted....

C. The Record With Respect to the Relator's Efforts to Obtain Supersedeas.

It was undisputed in the district court that the State Bar at no time made any

effort to have the Relator declared an irreparable threat to his clients or potential clients in accordance with the procedure established in Section 22 of Article X of the State Bar Rules. It is further undisputed that Relator has never been convicted of any crime of moral turpitude, which might justify immediate suspension in accordance with Section 26 of Article X of the State Bar Rules. On the contrary, it was undisputed that Relator is not an irreparable threat to his clients or potential clients, as is clearly indicated by the fact that Judge Casseb did not immediately commence suspension in the Judgment Revoking Probation (the Judgment was entered on Novemeber 21, 1988 and suspension did not begin until January 31, 1989). The reason for the deferral was so that the Relator could attend to important client business. Obviously, Judge Casseb would

not have deferred the commencement of suspension if the Relator had been a threat of immediate or irreparable harm to his clients or potential clients. (See cites to Record and discussion under Point Twenty-Two in Exhibit 13).

Furthermore, the State Bar did not offer any evidence in the court below which would establish or tend to establish a governmental interest in having the Relator suspended pending an appeal on the merits in this case. THe record is completely devoid of any evidence even suggesting a police-power reason for suspending Relator pending appeal upon the merits.

In addition, Judge Casseb did not grant an evidentiary hearing at which the State Bar assumed its burden of demonstrating that Section 24 of Article X of the State Bar Rules is constitutional; on the contrary, on the basis of simply a

telephonic hearing, Judge Casseb summarily denied the Rule 47 Motion. Lastly, the Court of Appeals likewise did not grant the Relator a hearing on Relator's Rule 49(b) Motion. The hearing was requested but the Court summarily denied the Rule 49 (b) Motion....

IV.

RELIEF REQUESTED

Relator seeks the following relief:

A. The immediate issuance of a writ of mandamus, mandamusing Judge Casseb to grant Relator's Rule 47 Motion which he has denied, and further mandamusing him: to set a reasonable amount as security for the supersedeas of the Judgment Revoking Probation; to set a reasonable time for Relator to deposit such security; and, upon the deposit of such security within the time allowed, to order the District Clerk to issue a writ of supersedeas, superseding the Judgment

Revoking Probation, pending the prosecution of Relator's appeal on the merits with effect.

B. The forgoing requested relief should be granted for two reasons:

1. Section 24, Article X of the State Bar Rules (Reprinted in Appendix to Texas Government Code, Title 2, Subtitle G, Vernon, 1988), which states that a judgment suspending an attorney shall not be superseded, nevertheless does not preclude superseding the Judgment Revoking Pobation, pending appeal in this case because - when such section is construed in pari materia with Sections 22 and Section 26 of Article X of the State Bar Rules, and construed in the manner that is consistent with traditional rules of construction, including the rule that it should be construed in such a manner as to render it constitutional - Section 24 must be

construed so as to permit the superseding of a Judgment of suspension unless either Section 22 or 26 has been satisfied or complied with or there are other police-power or substantial governmental interest reasons which would justify suspending an attorney pending an appeal which he is probably going to win.

2. If the Court does not construe Section 24 as suggested in 1. above then it has no choice but to hold that Section 24, since it would provide a blanket suspension of attorneys pending appeal regardless of whether or not there existed any police-power or substantial governmental interest reason for doing so, is unconstitutional and violates the Fourteenth Amendment to the Constitution of the United States as well as Sections 13, 15 and/or 19 of

C. Futhermore, as explained in the Summary of Facts above, the Relator is suffering irreparable harm on a day-to-day basis and the longer his suspension goes pending appeal, the more devastating the harm adversely affects him on a geometrically progressive basis. Relator has no adequate remedy at law because, even though he is going to win his appeal and does win his appeal, there is no way he can recover monetary damages in any amount which would make him whole for the harm done him and, even if monetary damages could provide some remedy (which it cannot), there is no defendant against whom he can recover any damages in all probability, because of the law of governmental immunity and qualified immunity. Also important is the fact that Relator has no adequate remedy of law because if this Court does not grant a mandamus, staying the

suspension pending appeal, there is no way that the issue of whether or not Section 24 has been construed properly or is constitutional can be determined as a justiciable issue because it will have become moot upon the completion of appeal, either way the appellate court decides the merits of appeal.

D. Lastly, there is a substantial probability of success on appeal and the questions on appeal present "a fair ground for litigation", therefore justifying an injunction to preserve the issue of supersedeas. There is no question but that Judge Casseb's Judgment Revoking Probation is going to have to be reversed on a number of grounds, all as reflected by the Points of Error listed in the Brief filed in the Court of Appeals (Exh. 13) discussed in the Argument and Authorities below.

E. Thus, all requirements for equitable

relief are present and this case is clearly one that cries out for an immediate mandamus as requested above. In connection with the writ of mandamus, if the Court deems the more appropriate procedural vehicle to be a Writ of Prohibition, prohibiting the enforcement of the suspension provisions of the Judgment Revoking Probation pending appeal and/or a Writ of injunction enjoining the enforcement of the suspension provisions of the Judgment Revoking Probation pending appeal, then Relator requests this Court to employ one of those forms of writ.

F. In the alternative, if the Court does not see fit to grant the Writ of Mandamus, Prohibition or Injunction requested under A through E above, then Relator requests the Court to grant a Writ of Mandamus, Prohibition and/or Injunction mandatorily directing Judge

Casseb to hold a hearing upon Relator's Rule 47 Motion that is compatible with due process - namely a hearing that places the burden upon the State Bar of Texas to produce evidence that either Section 22 or 26 has been complied with or that there is some other valid and justifiable police-power or substantial governmental interest reason for suspending the Relator pending appeal and further directing Judge Casseb that, absent satisfactory evidence of compliance with Sections 22 and 26 and/or proof of some other reason constitutionally justifying suspending Relator's license pending appeal, to grant supersedeas in accordance with Rule 47, T.R.A.P.

G. In the further alternative, if the Court does not grant the relief requested under A through E above, but grants relief under F above, Relator requests

the Court, as an adjunct to the relief under par. F, to grant relief pursuant to Rule 121(c) T.R.A.P., in the form of a temporary prohibition and/or injunction, prohibiting and/or enjoining the suspension provisions of the Judgment Revoking Probation pending the hearing to be conducted by Judge Casseb. For all of the reasons stated under A through E above, should the Court fail to grant the temporary relief sought herein, Relator will suffer irreparable harm and will have no adequate remedy at law....

PRAYER

Relator prays as stated under "Relief Requested" above.

Respectfully submitted,

/S/
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PRO SE

AA-1
(Excerpts)

CAUSE NO. 86-44452

STATE BAR OF TEXAS	]	IN THE DISTRICT
	]	COURT OF HARRIS
V.	]	COUNTY, TEXAS
	]	270TH JUDICIAL
BENTON MUSSLEWHITE	]	DISTRICT

STATEMENT OF FACTS

VOLUME IV OF 4 VOLUMES

November 7, 1988

CARMEN W. MILLER, CSR
Official Court Reporter
270th Judicial District Court
Harris County, Texas

BENTON MUSSLEWHITE,
having been called as a witness, after being duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PINSON:

Q. State your name for the record, please, sir.

A. Benton Musslewhite.

Q. And you're the respondent in this cause; right, sir?

A. Yes.

Q. All right, Describe in your own words to the Court your current financial situation, sir.

A. Well, I personally am in Chapter 7, bankruptcy laws, with the trustee appointed -- counsel represents -- and my --

THE COURT: Pardon me. I thought I was advised that the corporation --

THE WITNESS: Is in Chapter 11, Your Honor.

THE COURT: In Austin?

THE WITNESS: Yes, and my law firm and professional corporation, Law Office of Benton Musslewhite, Incorporated, is also in bankruptcy.

THE COURT: When was the corporation filed in bankruptcy, and when was our personal?

THE WITNESS: Personal was in 1986, I believe, Your Honor, and Law Offices of Benton Musslewhite, Incorporated -- I refer to as LOBM -- was filed for Chapter 11 in middle of 1987, I believe 1987.

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Q. What precipitated the filing of a Chapter 11 proceeding by LOBM?

A. Basically, the Agent Orange case. When I first got in that -- I'll make it very brief -- I thought it was going to be a monitoring situation. I was hired by Citizen Soldier, with all their people, Veterans Association then in effect for many years. Eventually, I was drawn into being one of the three members of a management committee appointed by Judge Pratt, who preceded Judge Weinstein in the litigation. Then, the three of us expanded the committee with permission of the Court to nine members. By that time, it became apparent I, along with four other lawyers, would be the trial team.

David -- let's see. There were David Dean, Steve Slagle, Tom Henderson, and one other would be the trial team. We got heavily involved on a full-time basis. It was just a gradual acquisition of my time and resources on a full-time basis. That drug on for a long

period of time, as you know, and it just became a financial drain; and then, when Judge Weinstein entered the order for fees which cut everybody substantially from what -- the time they had, even on a time basis -- we had made application on a time basis. It caused all of us, including myself, to sustain over a million, million and a half dollars in losses.

Q. How many dollars, if you know, in actual expenses did you disburse in order to engage yourself - in the Agent Orange litigation?

A. From my office?

Q. Yes, sir.

A. I think it was two hundred something thousand dollars, two hundred thousand-plus.

Q. Have you received any of that money back?

A. Well, fifty of it was awarded, and the four hundred ninety-seven thousand dollars is now in the Registry of the Court in New York.

Q. Do you have any expectaton of recovering any further.

A. Other than four hundred ninety-seven thousand? No.

Q. Right.

A. Yes. Depends on how we fare in the Claims Court of the United States in Sharkey v. U.S. and how we fare in the other litigation.

Q. But that's another lawsuit, right, sir?

A. Those are other lawsuits pertaining to Agent Orange.

Q. I guess my question is: What is -- based on the orders that Judge Weinstein has thus far entered, what sums of money can the Law Offices of Benton Musslewhite reasonably expect to receive back in compensation for your efforts and the expenses advanced?

A. Four hundred ninety-seven thousand dollars total. There will be no more.

Q. And of that, approximately two hundred thousand dollars was expenses?

A. He didn't award two hundred thousand expenses, but we had claimed that much.

Q. All right. Well, why did that particular ruling impact Law Offices of Benton Musslewhite, Inc. so that it had to file under 11?

A. Well, because I had, instead of being able to try and settle other cases -- for example, in the two years after I got out of Agent Orange, I was able to finally get back in the swing of trial, and we got judgments and entered over $30 million in one year. Most of those are still on appeal, so that was not enough; but, basically, for that two to two and a half years, almost three years, I was always involved in Agent Orange; not only am I taking my time spent on the case, but it means I'm not receiving income from other cases and from other matters, although some, of course, settled along the way. It had a tremendously adverse impact on the ability to earn money. It had an adverse impact on the ability to make cases, advances of expenses and trial litigation costs, and it affected my staff. I had to cut back on my staff when I got out of litigation, and it just had an impact that proliferated all the way through my practice.

Q. As a consequence of the economic setbacks from that piece of litigation, were the Law Offices of Benton Musslewhite, Inc. unable to pay their debts as they ordinarily

accrued?

A. It became apparent to me, although I tried for a year after Judge Weinstein cut everybody and cut us down to where we were not awarded our minnmum time on a time basis and cut the expenses, as well, that while other attorneys who had suffered the losses were more able to handle it, I just couldn't handle it. I eventually resolved the matter by simply making a decision to file for Chapter 11.

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Q. All right, sir. How many children do you have, Mr. Musslewhite?

A. I have seven.

Q. What are their ages?

A. Three are grown and four are small.

Q. How old are they?

A. Seven, ten, twelve and thirteen.

Q. Are they all attending school here in Houston?

A. Yes, they are.

Q. Harris County? All right, sir. And they are all the children of your current wife; is that correct?

A. Correct.

Q. You and your current wife?

A. Correct.

***

Q. Have you commenced making efforts to refer those cases out prior to your anticipated period of suspension?

A. I'm sorry. Yes, I have. Absolutely.

Q. All right. Have you had any success?

A. Yes, I have to some extent. There's still some that I have not been able to refer out.

Q. How many?

A. Probably 25 so far, as of this time.

Q. Of that 25, in your estimation, how many do you believe you will be ultimately successful in referring out?

A. I think, that's a number between 20 and 25, which we discussed with Mr. Hamilton previously, the number that I'm not going to be able to refer out.

Q. And why? Tell the Court.

A. I'm not saying that's absolute, but the way it looks now.

Q. Well, tell the Court why you do not blieve you will be abnle to refer those cases out.

A. Well, they're just more difficult cases in terms of liability issue and they are not easy cases; and the damages in those cases are not sufficient to justify in the mind of a lot of lawyers, I suspect, the hard battle of liability.

Q. All right, sir. So, what -- what, if you know, will transpire in the event that you are suspended, in the event you are unable to refer those cases out?

A. I probably will have to withdraw. Of course, I'll have to withdraw, no question about it. That would be required as part of the procedure that we've discussed last week.

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Q. All right, sir.

Now, let's talk about the Reese case. What is the latest information with respect to the probability of going to trial on the Reese case?

A. It is going to trial; had a hearing on it last Monday, and it is going to trial on November 28.

Q. All right, sir. And, in the event that it's going to tria on November 28, when can you reasonably anticipate that it will be wound up?

A. Well, we told the Court, at the outside, three weeks. We also estimated that we might be able to try it in two weeks, but since we have no control over the number of witnesses and they've listed a long number of witnesses -- the defendants have over 20 employees that they may call to the stand, as well as their experts and so forth -- I suspect three weeks is more likely the amount of time that will be needed.

Q. Two to three weeks, three weeks at the outside?

A. Three weeks at the outside. I'm hopeful. I've seen cases last a lot longer. Lawyers go beyond the estimate, but that's the best estimate I can give the Court now.

Q. So, we'd be talking about approximately December 7, December 20, to wrap that up?

A. Correct.

Q. All right, sir.

Mr. Musslewhite, do you have -- do you presently have any means of earning a living other than the practice of law?

A. No.

Q. Does your wife?

A. No.

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THE WITNESS: Your Honor, I had one area I wanted to cover, if I could do it by statement.

Two things, on the Reese case, I talked again, talked with Broadus and talked with the client, and the client still has asked that I be allowed to try the case with Mr. Spivey because of the fact I've been in it during the entire time it's been on file, almost or soon after it was filed, and he wants me to try it along with Broadus Spivey; and, secondly, on the -- I haven't had a chance to say to the Court that I have gone through every Bar Jornal, but I have to the extent that the underlying causes of action are relevant in the Court's mind for punishment.

There are two cases there. One was the four cases involving Barham, Merit, Jenkins, the travel agency; and I don't know whether the Court recalls, but one of the primary thrusts of those three was the answering, failure to answer telephone calls. I had not realized until recently that -- I'd like to have it marked and offered -- that the Bar put out a brochure that advised that normally that is not grounds for discipline; and, then, also one, if the Court will let us, I'd like to offer two depositions, only depositions taken in that case; and then show -- they demonstrate absolutely no harm befell anyone of those four clients. Travel agency was paid. Mrs. Merit hired another lawyer, and I guess her case is going on all right. Her statute did not run as was alleged. On the Barham case --

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THE WITNESS: Well, along that line, I don't know what the Court's -- in the Court's mind about determining what is proper for revocation, whether you spring from the original or not, but to the extent the Court might do that, that's why I offer it, Your Honor; and Mrs. Barham, her case was settled to her satisfaction, proved up in the court with a guardian ad litem while I was still attorney; and Mrs. Jenkins, if she wanted to, she could have her file back. Basically, that case turned on miscommunication, which is also mentioned in this exhibit. And, when you look at this exhibit, read the complaint and read the deposition, Your Honor, you come up with a feeling that this must be the only case in history of the Bar Association, only one I can find so far where they've attempted to disbar an attorney for the kind of things they've alleged.

Now, the other case was solicitation and fee splitting. I've also denied the solicitation. I would call the Court's attention to the fact the Supreme Court of Texas is now deciding whether or not provisions under which they charged me in that case are constitutional; and, certainly, I'm sure the Court would understand (the impact on this case if) in the O'Quinn case they are held unconstitutional. We will ask the Court to void the agreed judgment because it would be based on unconstitutional sectons under disciplinary rules and Bar rules.

Two, it was undisputed. Two of the people they named in that as so-called runners I never met before. Three were clients. Two -- one was a head of the Veterans Association that had been in business long before I ever met (him, representing) Agent Orange people.

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THE WITNESS: I'll try to make it short, Your Honor.

There never really was in my mind a case there, and you recall, Judge, that when they agreed to consolidate, that that case, the other cases -- and they came up for trial on

November 1987 -- the Bar said they weren't going to be ready to go on the so-called solicitation case and asked for severance -- after they agreed to consolidate, asked for severance, (and a continuance was) granted by the Court .... Your Honor, I've always conceded as to the last allegation in the second cae, the fee splitting with lawyers, that some of the arrangements I have with Mr. O'Quinn and other lawyers called for the splitting of fees on cases in which it was not anticipated they would be doing any work.

As I now read the disciplinary rules, that could be a violation. I've always conceded that, but I just submit to the Court that the extent of that, if it is a violation, was no one was hurt. No one was injured. It was in good faith.

Now, when we get to the grounds for revocation, I'm not going to repeat all the testimony. The Court's heard it. But I do say this to this Court that when I went to Scotland, I did not believe that I would be receiving any cases and in the event that I would be called upon to discuss that matter, as I testified, and nobody contradicted, I had arranged to refer those cases to Mr. O'Quinn, and he had agreed to accept them. I believe that what was going to happen is what has happened, and that is we would go over and give some free advice which I don't mind doing. I've done it many times in the past, and that advice might help them in settling the cases. As a matter of fact, I've been advised now that settlement offers in Scotland are up over a million dollars a family for the average family, wife and children. At the time I went over there, they were 120,000 pounds maximum. Some of the solicitors were trying to arrange a settlement as a package for all of them for that amount. ... -- I can say without being conceited about it, but I'll just lay it on the line with this Court, that what I did over there has ended up helping to some extent, I think (it) created a climate for a higher level of negotiation. It's undisputed

that nobody got hurt in that situation. I never talked, as Mr. Smoot admitted on the stand, to a single victim. Never intended to and no victim was ever misled; nothing ever happened. It's undisputed, based on the records before this Court, that the solicitors that we talked to, when the matter of employment came up, they were fully advised of my situation with the Bar Association so that they were not in any way misled; so that -- I have to say this in all candor, Your Honor, to me, that whole situation is much ado about nothing. I know the Court may not agree with me on that. I do say this: I don't think there's anybody (who) can question (what we did) by reading Shapiro and (by reason of the fact that I made) it clear in everything that I did that we would talk only to ... solicitors and not to victims and we never talked to victims and only talked to solicitors. ...

As to the Hartman matter, that's in a sense a tragic thing. ... I've got two firms willing, either one of which is willing to accept the case if I'm permitted to accept the case, that will carry that case forward; and it's really a good case based upon present medical science. It involves a non-Hodgkins disease lymphoma, and there's been two studies since we settled the Agent Orange case in New York against chemical companies which shows those are related to Dioxin exposure and medical science is good. Tragically, it's such a complicated can of worms and Judge Weinstein's actions on fees created such a chill effect that it's hard to get lawyers to get involved in Agent Orange. I submit in the interest of this country and in the interest of the veterans of this country, to the extent this Court is willing to let me, that I be allowed to participate in those cases because they're that important. They're that important to a group of people that served our country with honor, and they were poisoned and they're dying a little bit a day at a time. It's only fair that they have their day in court and I'm the only lawyer of all the members of the former

management team ... that (his) continued to battle for their day in court, either in Claims Court of the United States (or) in ... -- this new phase of the actions, and any other aspect of the actions, but -- so I submit that in mitigation and I say to you, Your Honor, ... -- I have a hard time understanding how I can be disciplined and suspended for a substantial period of time for referring a case in the manner in which the undisputed evidence before this Court, by two prominent members of the Bar, Mr. Spivey and Mr. Hogan, said all plaintiff lawyers (should)refer those cases. I did it, and the (agreed) judgment, I call the attention to the Court, does not tell me differently, and I did it as I thought wa proper; and the minute I heard there was a problem with it, I told Mr. Hartley Hampton, who's sitting there. I was glad to hear that he and I and Mr. Smoot were going to get together and clarify, because I thought I was doing it right. If there was any question, I wanted to do it as Mr. Smoot thought I ought to do it.

Unfortunately, that meeting didn't come about before they filed a motion to revoke me. (Mr. Smoot cancelled the meeting). Mr. Smoot never asked at that time -- called Mr. Hampton, said, "Let's get another meeting, try to work that out." Had the judgment said that I can't first sign a client on a power attorney before I refer it, if it said that, I wouldn't have done it, Your Honor. I say that under my oath. So I suggest and submit respectfully to this Court, ... that nobody has been hurt by anything I've done. Nobody's been harmed. There have been some benefits from what I've done, as I've testified to here, and I did everything in good faith; and to suspend me for three years for all of this, springing from the earlier to the present, to me, Your Honor, I respectfully say to the Court I don't feel it's fair. I feel it's selective prosecution. I don't think the Court can go through the Bar Journal, and I've been through (it) to a certain extent -- I here now swear I've never seen any case in the Bar

Journals that comes anywhere close to this kind of punishment for the things that they're talking about. I can't find anybody that's been punished for most of these things. But, ... in summary, Your Honor, I respectfully ask the Court to consider, if it is going to find that there's been a violation of the agreed judgment, that the amount of punishment be far less than what the Court has indicated in its letter, and I would like to offer that as an exhibit, and that's all I have to say.

DIRECT EXAMINATION (continued)

BY MR. PINSON:

Q. One question, Mr. Musslewhite; with respect to the Hartman case, which was one of the two prongs of the allegations in the motion to revoke your probation here, are you telling the Court that, if you are suspended, that the Hartmans will not have a lawyer to represent them?

A. Well, the two firms that I have talked to, that indicate once I find out how it's to be done that they would take the case on, wanted me to be involved because the key is military contractor's defense. I handled that part of the Agent Orange litigation in New York, and they just don't want to have to go in and read 250 depositions that were taken on that one defense alone, 250-plus. They don't want to have to do that. I've done it and pretty much have it all in my mind, and I've participated in it, and that's why they wanted me to be involved. They're willing to be lead counsel, finance (the) litigation and case manage it in their office as I understood the provisions require; and, again, I respectfully submit to the Court and to you, Mr. Pinson, that that's not a new case, anyway. The Hartman case is part of the ongoing Sharkey litigation, but, nevertheless, if the Court believes it is a new case, I think it's important that somehow or another, for the sake of these people and

there are a number of cases waiting to join that case that involve soft tissue sarcoma and non-Hodgkins disease lymphoma, both of which medical science supports.

Q. Well, let me ask you another way. How, in the event of suspension by you, how are the Hartmans' interest, your clients' interest, going to be protected?

A. I don't know that anybody will go forward with those cases -- and there's about 20 of them in that category -- that will go forward with those cases for our Vietnam veterans if the Court does not allow me somehow to handle those cases. That's my opinion at this time. It could be different.

App. AA-2

NO. 86-044452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	]	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	]	270TH JUDICIAL DISTRICT
BENTON MUSSLEWHITE	]	

NO. 87-244402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	]	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	]	151ST JUDICIAL DISTRICT
BENTON MUSSLEWHITE	]	

AMENDED MOTION TO DEFER IMPOSITION OF NINETY-DAY ACTUAL SUSPENSION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW BENTON MUSSLEWTHIE, Respondent in the above styled and numbered causes, and moves the Court to defer the time for the ninety-day actual suspension period and for such Motion would respectfully show:

I.

The Agreed Judgment in this cause reflects that, upon proper motion by the Respondent, this Court has the discretion to defer the imposition of the ninety-day actual suspension period to a time frame no later than August 31, 1989. The present time period

scheduled in the Agreed Judgment, should the Court not exercise its discretion to defer, is November 1, 1988 to and through January 31, 1989. ....

II.

This deferral is sought for good and sufficient reasons:

1. There are a number of settings and necessary discovery undertakings which have been scheduled during November, December and January and because of those settings it would be, insofar as the clients are concerned, in their best interests to have the actual suspension period postponed until the summer of 1989. These include: **Reese vs. Pedernales Electric Cooperative, et al**, Cause No. 85-068-C in the 26th Judicial District Court, Travis County, Texas, (this case, originally scheduled for trial, by preferential setting, on October 10, 1988, has, because of life-threatening illness of a family member of Defendant's counsel, Mr. John Coats, been recessed until October 24, 1988 and the trial will require two weeks,

possibly more, to complete and the case will thus continue past November 1, 1988; this is a serious case involving a paraplegic and the case has been pending over three years; for harship reasons, including expiration of medical insurance, the client needs to have the case tried as soon as possible; it would certainly be harmful to the interests of the client to postpone the case and would, as the client will verify, be harmful to the client if (he) were deprived of the counsel of the Respondent, whom the client has insisted try the case along with Broadus Spivey); Gloria Chaplin, et al vs. Exxon Corporation, et al, Cause No. 84-68849 in the 61st Judicial District Court of Harris County, Texas (this case involves the Liberty Waste Dumpsite and it has always been the desire of the clients that the undersigned counsel be one of the lawyers to actually try the case; the case has been set for trial for October 17, 1988 but very possibly will be reset to a later date, in December, 1988 or January, 1989, because of the need to complete discovery and

to take care of other pretrial matters; this case is an extremely important one and the first trial involves five Plaintiffs who live near the dumpsite and suffered property losses as well as personal injuries); **Lovelace Soirez, et al vs. Dunn Equipment, Inc., et al**; Cause No. 85-F-2973; In the 149th Judicial District Court of Brazoria County, Texas (this case is now scheduled for trial for the first two weeks of November 1988; the Respondent has promised Plaintiffs that he would try this case; the trial at that time is urgent because of the deteriorating health of the Plaintiff; this case is a serious case, involving serious brain injuries, and needs to be tried as soon as possible; see letter of Robert Binstock, who has been case managing the file on behalf of Plaintiffs, and who confirms the above, attached as Exhibit A); **Paula Emmert (Moore) vs. Harris County Hospital District and Ben Taub General Hospital**; Cause No. 83-15168; IN the 152nd Judicial District of Harris County, Texas (this case is set for trial on January

2, 1989, it is an old case which must be tried or be subject to dismissal for want of prosecution, the client wants Respondent to try the case and the case probably will not settle). It should be noted that the Peel case, which was mentioned in the original Motion to Defer, has now been settled and the depositions in the Far East in the Grunke, et al case are being changed to March of 1989. There are other cases which are set for trial during the three-month period, of November 1, 1988 to January 31, 1989 but the foregoing cases are the most important ones and which create good cause for postponing the actual suspension period from November, 1988 - January, 1989 to June, 1989 - August, 1989.

***

Respectfully submitted

/s/

THEO W. PINSON
GREENWOOD, KOBY, OLD,
PINSON & BUSSEY
1900 Wortham Tower
2727 Allen Parkway
Houston, Texas 77019

ATTORNEY FOR RESPONDENT

APP. AA-3
[Excerpts]

NO. 14-89-00041-CV

*

COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

*

BENTON MUSSLEWHITE, APPELLANT

VS.

THE STATE BAR OF TEXAS, APPELLEE

*

On Appeal From the 270th Judicial District
Court of Harris County, Texas

*

BRIEF FOR APPELLEE STATE BAR OF TEXAS

Respectfully submitted,

Steven D. Peterson
General Counsel

Linda A Acevedo
Assistant General Counsel

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Austin, Texas 78711
512/463-1381

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Musslewhite also argues that the trial court should have granted his request for supersedeas pursuant to Rule 47, Tex.R.App.P., which provides in part:

> Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk. ... (Emphasis added).

Art. X, Sec. 24, State Bar Rules, provides as follows:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, he or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Emphasis added).

Musslewhite argues that either (a) Section 24 should be read in conjunction with Sections 22 and 26 of the State Bar Rules or (b) Section 24 is unconstitutional.

His first argument is based on some theory that the meaning of Section 24 is not clear. Section 24 is clear, unambiguous, compulsory, and constitutional. The rule

simply provides that lawyers, such as Musslewhite, may not practice law pending appeal of their suspension or disbarment. This statute specifically addresses the status of a lawyer who has been suspended from the practice of law during pendency of the appeal. No discretion to override this statute is granted to any court. Thus Judge Casseb was correct in denying Musslewhite's motion. Judge Casseb not only had no duty to permit Musslewhite under any terms to secure a stay of his suspension, Section 24 clearly establishes that Musslewhite has no right to practice pending appeal. Judge Casseb did not even have any discretion to abuse.

Musslewhite contends that to establish the meaning of Section 24, it must be read along with Section 22. Section 22 by its very terms had nothing to do with an attorney subject to a trial court's final order of suspension or disbarment. Secton 22 permits an immediate interim suspension, similar to a temporary injunction "pending the final disposition of a disciplinary action ...." A

Section 22 interim suspension protects the public during the course of a grievance matter against a lawyer found to be an immediate threat to the public, whereas Section 24 protects the public from a lawyer suspended or disbarred after trial.

The rules cannot mandate Section 24 be construed in pari materia with sections 22 and 26. Lawyers are suspended and disbarred for reasons other than conviction or threats to the public. In fact, most lawyers are suspended and disbarred for reasons other than having been convicted or because they are threats to society. Thus, Section 24 specifically contemplates those lawyers who are suspended and disbarred for reasons other than constituting irreparable harm and/or being a convicted felon.

In addition, Section 22 provides a mechanism for suspension throughout the process when the lawyer is shown to be an imminent threat to the public. Likewise, Section 26 provides its own mechanism for dealing with lawyers who are appealing their

criminal convictions and mandates that they be suspended while doing so.

Thus, Section 24 not only covers the above-mentioned situations but also all other situations in which lawyers have been suspended and disbarred. There is absolutely no implied conflict between these sections.

Musslewhite argues that if one does not read the sections together then Section 24 must be unconstitutional. ....

More importantly, when dealing with attorney discipline, the primary concern is protection of th public. Lack of public confidence in the integrity of the bar overrides any policy that would permit an attorney who has been duly found by a tria court of competent jurisdiction to have committed professional misconduct to continue tc practice law pending appeal of their suspension or disbarment.

***

Thus, Musslewhite has no constitutional right supersede the suspension order pending exhaustion of appeal. The no supersedeas rule

is analogous to a lawyer being suspended by operation of law pending appeal of a criminal conviction for a serious crime. In both instances, the lawyer may eventually secure appellate reversal and therefore practice law again, but the confidence of the public and the bar compels that lawyers convicted of serious crimes, and lawyers suspended or disbarred after trial of a disciplinary action, must be suspended pending appeal.

> The practice of law is a license, not a right, and only persons of good moral character and fitness are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands.

State Bar of Texas v. Heard, 603 S.W.2d 829, 834 (Tex. 1980). Musslewhite is in no better position. In fact, should Musslewhite be permitted to practice pending appeal, and should appeal eventually favor the State Bar, at the Texas Court of Appeals, the Supreme Court of Texas, and/or the United States Supreme Court, Musslewhite may effectively avoid most of his suspension.

Musslewhite's attempt to analogize his situation with that of Texaco/Pennzoil is misplaced. The Second Circuit case dealt with the essential elements necessary in bringing a 1983 action. In addition, the issue in *Texaco* was that of a denial of a fair opportunity to obtain an adjudication on the merits of an appeal. In Texaco, the posting of the bond would have destroyed the entity itself. Here Musslewhite retains every opportunity to appeal his case and every opportunity to continue to earn a living - albeit not in the field of law. If the judgment to revoke is reversed,the sole harm to Musslewhite is the deprivation of his privilege to practice law or its monetary equivalent. His complaint is nothing more than that of loss of economic earning power.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS, AND AUTHORITIES CONSIDERED, Appellee prays the judgment of the trial court be affirmed in all respects.

Respectfully submitted,

Steven D. Peterson
General Counsel

Linda A. Acevedo
Assistant General Counsel

State Bar of Texas
Office of the General Counsel
P. O. Box 12487
Austin, Texas 78711

/s/
Steven D. Peterson
State Bar Card No. 15842000

/s/
Linda A. Acevedo
State Bar Card No. 00829825

ATTORNEYS FOR APPELLEE

THE STATE OF TEXAS]
]
COUNTY OF HARRIS]

BEFORE ME the undersigned authority appeared GLORIA CHAPLIN, known to me to be the person whose name is subscribed hereto, and after first being duly sworn did upon his oath state, swear and affirm as follows, to-wit:

"My name is Gloria Chaplin. I am one of the leading plaintiffs in the case of Eva Fontenot v. C.P. Joiner, et al, Cause No. 84-68849, pending in the 161st Judicial District Court of Harris County, Texas. In 1984, I hired Benton Musslewhite as my attorney to represent me and other people who live near the Liberty Waste Dumpsite to sue the companies that had deposited toxic waste in that dumpsite, created a nuisance, caused me injuries and caused me to sustain property damages. I had heard and had read about the work Benton had done in connection with that lawsuit (the Agent Orange lawsuit). The impression I got was that he had been willing to stick with the case no matter how long or difficult or complicated it had been. I recommended to all my neighbors that they hire Benton also and I believe over a hundred people signed up with Benton. He later brought into the litigation John O'Quinn, Joe Jamail, Wayne Fisher, Bill Edwards and Hill & Parker. They stayed in the case for approximately nine months and then pulled out. They indicated to me that, while they thought the case had some merit, they could probably spend their time and money on better cases that would not be so difficult - the

implication was that they felt that they could make more money handling other litigation than this case. Benton then got Dennis Reich to work with us on the case and he in turn, through some contacts of ours, brought Don Maierson, Tom Pearson and their offices into the case. I always knew that Benton was not in the financial position to finance the case, nor was Dennis or Don Maierson or Tom Pearson. Benton and I then persuaded John O'Quinn to come back into the case, finance the case and consult with us on it and he agreed to do that, with the understanding that he would not be expected to try the case. I had always wanted Benton Musslewhite or John O'Quinn to try my case. They were my first choice. Part of the reason John O'Quinn could not try the case was that he was having to spend so much time trying to defend himself against the State Bar Association. But that did not bother me too much because I knew Benton could try the case and I had a lot of confidence in him as a trial lawyer. I had read about some of his victories in the courtroom and so I and all of my friends who hired Benton and who live around the Liberty Waste dumpsite were looking forward to him trying the case.

Then the Bar got after Benton. I just cannot believe how vicious they were. They called and asked me to come down to testify against Benton and told me not to bring Benton with me. He was my lawyer and I wanted him to come. I asked Benton about that and he simply said that, since I did not have anything to hide, and there was nothing wrong about the way I and my neighbors had employed him, that I should go on down and just lay all the cards on the table. So I and Eva Fontenot went down to the Grievance Committee.

I was shocked at their attitude - they were so hostile, aggressive and critical of Benton and John O'Quinn. The greatest shock of all was when Eva and I finally found out that one of the members of the Grievance Committee was

law firm who represents Exxon in my case and who representes most of the other defendants. This person was whispering to other people to ask questions and some of the questions, as far as I could recall, pertained to the merits of the case. I later reported this to Benton and he was very upset about it. Eva Fontenot and I discussed it later and we got more and more upset the more we thought about it so we filed a grievance. We filed a grievance against the Committee 4-C for doing what they did to me and Eva which was totally improper, highly unethical and just downright rude. To this date I have heard nothing more about the grievance. Eva and I have talked about it on repeated occasions and even talked about filing suit against the State Bar. We may still do that.

Judge Casseb eventually suspended Benton for three years. I testified in his Court, and maybe I am wrong, but it seemed to me that everything was so cut and dried when I was down there. I was rushed on the stand and rushed off and did not get to really say what I wanted to say. In any event I made it clear to Judge Casseb that I wanted Benton to try my case and asked him not to commence the suspension of Benton until after the case was tried. This was in November of 1988 when I was before him and the case was set for trial for May of 1989. Other plaintiffs were asking Judge Casseb to defer the suspension so Benton could try their cases too. Judge Casseb finally did defer the suspension so that Benton could try a case over in Austin. I cannot recall the name of the case but it involved a paraplegic. But Judge Casseb refused to defer the suspension long enough for Benton to try our case.

This really upset me. I really do not think much of the State Bar Association, particularly the way they do not seem to care about the rights of people that lawyers are supposed to represent and protect. In any event, I was then deprived of the two

attorneys that I had wanted as my first choice lawyers, Benton Musslewhite and John O'Quinn. Therefore, I had to go to court with the other lawyers. I want to say this: I am not in any way casting aspersions on the efforts made by the lawyers who tried my case. Don Maierson, Tom Pearson, Dennis Reich and Stephenie Shapiro were all in the courtroom working on my behalf and Benton did a lot of paralegal work out of the courtroom. We were fortunate in that we got a million dollar verdict for the three of us whose cases were being tried, (myself, Eva Fontenot and Fannie Cook). And I want to say that I could tell that all the lawyers who were there trying my case in the courtroom, Mr. Maierson, Mr. Pearson, Mr. Reich and Ms. Shapiro were working hard and doing their very best. I have nothing but appreciation for the work that they did for me. But, I believed then, and still believe now, that Benton could have gotten me a greater recovery. He has gotten many million dollar recoveries and settlements and he had the experience.

There is something seriously wrong in this country when a state bar association can do what they have done to Benton Musslewhite. I know Benton and I have gotten to know how he operates. I believe I have been around him in his office enough to be able to say that he has always gotten his cases from proper sources, people that know him; people that have read about him; people who are in organizations that have used him before; other attorneys and former clients. I just think they wanted to sacrifice Benton and that is what they did. I am very upset about it and, most of all I am upset because, although I thought I lived in the greatest country in the world, I was not given the right to have the lawyer of my choice to represent me because of what the Bar Association that is supposed to protect my interests, did to me."

/s/

GLORIA CHAPLIN

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS THE 7th DAY OF SEPTEMBER, 1989.

/s/

Notary Public in and for
Harris County, T E X A S

My commission expires:
10/19/92

App. BB-2
[Excerpts]

GLORIA CHAPLIN,

having been called as a witness, after being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINSON:

Q. State your name, please, ma'am.

A. Gloria Chaplin.

Q. Where do you live, Ms. Chaplin?

A. 109 Mizel, Highlands, Texas.

Q. How are you employed?

A. I'm not at this time except for selling Avon.

Q. Ms. Chaplin, do you know the respondent, Benton Musslewhite?

A. Yes, sir.

Q. How long have you known him?

A. Since May, 1984.

Q. Is he your lawyer in a particular case?

A. Yes, sir, in the Liberty Waste Dumpsite case. He's supposed to be my trial attorney.

Q. Okay. Are you a plaintiff or one of a group of plaintiffs?

A. One of a hundred families.

Q. Is this case pending in State or Federal court.

A. In State court.

Q. Are there any other lawyers involved in the Liberty Waste case?

A. Yes, sir.

Q. Who is that?

A. Tom Pearson, Don Meyerson, Donna Klein, Stephanie Shapiro, John O'Quinn.

Q. And do those folks all represent you and the other hundred families?

A. Yes, they do.

Q. Tell us briefly in your own words what the plaintiffs are claiming in that case.

A. Personal and property damage from the chemical dumpsite.

Q. What chemicals were dumped there and by who, according to the allegations in the complaint?

A. Many chemicals.

Q. Who used this location as a chemical dumpsite?

A. Twenty-two oil companies that I know of.

Q. Ms. Chaplin, how long has that case been pending?

A. Since July 1984.

Q. Has Benton Musslewhite at all times been associated with that case?

A. Yes, sir.

Q. Have you had any difficulty with getting other lawyers to work on that case?

A. Yes, sir.

Q. What kind of difficulties?

A. Well, I've had several attorneys that have taken the case and then backed out.

Q. Did that happen on more than one occasion?

A. Yes, I believe there's six or seven attorneys that have dropped our case.

Q. Has Mr. Musslewhite? Was that prior to Mr. Musslewhite's involvement?

A. No.

Q. How was the work divided up between Mr. Musslewhite and the folks that dropped out of the case?

A. They all had separate parts to do. I don't know how it was divided up.

Q. Okay. At any rate, as a result of those other people dropping out, did Mr. Musslewhite assume a larger responsibility for the case?

A. Yes, sir.

Q. That is, of your own kowledge, do you know whether he had to do more work as a result of these other folks dropping out?

A. Yes, he has.

Q. Did Mr. Musslewhite ever threaten to drop out?

A. No, sir.

Q. What -- who are you requesting perform the trial work in this particular case?

A. Mr. Musslewhite. He promised me in 1984 that he would be my trial lawyer.

Q. How have your relationships been with Mr. Musslewhite in terms of being able to communicate with thim in this case?

A. Mr. Musslewhite has always called me when I called him. He always returns my calls or has someone from the office, and I've met with im on a monthly basis since I met him.

Q. During the five years that his case has been on file, have you or Mr. Musslewhite received any money by way of compensation or settlement, partial settlement, interim settlement, anything of that nature?

A. No.

Q. Has Mr. Musslewhite continued to work on your behalf in this case?

A. Yes.

Q. When is your case set for trial?

A. It was set October 17, but it's been moved to April of next year.

Q. All right. Are the other lawyers on the case -- were they designed to have primary responsibility for the trial?

A. No, sir.

Q. And who have you at all times been expecting to try this case?

A. Benton Musslewhite.

Q. And if Mr. Musslewhite is under a period of suspension during this period of time, who will you get to try this case, if you know?

A. Probably Mr. Tom Pearson.

Q. Is he the lawyer you want to have try this case?

A. No, he isn't.

Q. Ms. Chaplin, I understand that you brought in here today with you a petition?

A. Yes, sir.

Q. Would you tell the Court in your own words what this petition is about?

A. This is a petition that I took to the Attorney General's Office requesting some things done about the dumpsite, and I also asked that the charges be dropped against Mr. Musslewhite and Mr. O'Quinn, and I have 1500 signatures.

Q. Okay. Where did you obtain those signatures?

A. From my neighbors, friends, people living around the dumpsite.

Q. Are those people that Mr. O'Quinn, Mr. Musslewhite have been representing in this case?

A. Most of them.

Q. So, are we talking about folks that live out there in the dumpsite that are trying to get something done about the dumpsite, that are trying to get damages as a result of the problems with the dumpsite, who want Mr. Musslewhite to stay on this case?

A. Yes, sir. These are the people that are in the lawsuit, and friends and family of the people, and neighbors.

Q. Did you collect these signatures?

A. Myself and my children and Nora Talent, who's also one of the plaintiffs in the lawuit.

MR. PINSON: We offer the petition as Defendant's 2.

***

Q. Okay. Did these other lawyers come onto this case at Mr. Musslewhite's request, or was this your design or the design of the plaintiffs in that case to bring on additonal counsel, Mr. Pearson, Mr. Meyerson, Mr. Shapiro, Mr. O'Quinn? Did they come at Mr. Musslewhite's request or your request?

A. Mr. Musslewhite's and mine.

Q. Were you introduced to these gentlemen by Mr. Musslewhite, or did you find out about these lawyers from somebody else?

A. Mr. Musslewhite and Mr. O'Quinn introduced me to the other attorneys or the attorneys, and Mr. Royceman -- I met Mr. Royceman and I went to speak with him is how I met Mr. Pearson and Mr. Meyerson.

***

REDIRECT EXAMINATION

BY MR. PINSON:

Q. With respect to the matters that counsel has just elicited from you, had you been queried in the past by Bonnie Britt of the Chronicle and Romero Garcia of the State Bar concerning these matters?

A. Yes, sir.

Q. Were they the folks that asked you not to tell your lawyer that you had talked to them?

A. Yes, sir.

Q. Did they explain why the didn't want you to talk to your own lawyer?

A. No.

***

Q. (By Mr. Pinson): At a later time, did you make an appearance before the Grievance Committee at someone's request?

A. Yes.

Q. And do you recall whether or not there were lawyers on the Grievance Committee that were asking you about the details of your case?

A. They all questioned me.

Q. Were they asking you about personal details, that is to say, the allegations and your contentions, things that you would have discussed with your lawyer?

A. It seems to me that's the way it was, yes.

Q. Do you know who those folks were? Were they with the Grievance Committee?

A. Yes. There was a Mr. Whitcalla (sic) who sat over in the corner. He was with Baker & Botts. He took notes. He didn't question me, but the rest of them did.

Q. Did Mr. Romeo Garcia, of the State Bar -- did he ever give any explanation why you shouldn't talk to your lawyer about the things you talked with him about?

A. No, but he sure got mad at me.

Q. Did he say why he was mad at you?

MR. LANDEN: Your Honor, I fail to see the relevance to the matters before the Court at this hearing.

THE COURT: Sustained.

MR. PINSON: I believe that's all we have, Your Honor.

App. CC

[Excerpt]

CHARLES BENTON MUSSLEWHITE

having been called as a witness and previously duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SMOOT:

Q. State your name, please.

A. Charles Benton Musslewhite.

Q. How are you employed?

A. I'm an attorney, self-employed.

Q. How long have you been a lawyer?

A. Since 1954.

Q. Where do you practice law?

A. Houston, Texas.

Q. How long have you been practicing in Houston?

A. Since 1971.

Q. And are you also known as Benton Musslewhite?

***

Q. (By Mr. Smoot) Did you have any discussions with Mr. Newman and McDonald regarding newspaper advertisements?

A. Mr. Newman discussed it with me over the telephone.

Q. What was discussed?

A. Just that, I believe the way he put it, he and Mr. McDonald suggested one of the last ways of trying to, since he was going to be leaving within a week or so, to get contact with the solicitors would be through a newspaper ad.

Q. And have you seen that newspaper ad?

A. I have since I got back. You showed it to me.

Q. May I show you Petitioner's Exhibit 2, Mr. Musslewhite? Does that look like the ad?

A. That's the one you said was run and I have no way of -- I didn't see it when it was run. I've never seen it in a newspaper and I didn't get to see it before it was run. I was not in Aberdeen when it was run.

Q. What did you do about this being an ad run?

A. Mr. Newman and I talked about it. I was opposed to it at first as I think he will tell you and I was concerned about it and he assured me that it had the caveat in there that we would speak only with solicitors and not with any victims or their families and I said, "Well, Kelly, it's up to you." I don't think I have the power to tell him to do or not do anything more than he would have the power to tell me.

Q. You didn't tell him not to run it?

A. I didn't say I'm going to come up there and stop you like that. No, I did not. I did not feel I had the power to tell him not to but I made by objections. We discussed it. I said, "Do what you think is right."

Q. Did he read any of the language to you over the phone?

A. He did. I remember he read the language about where it says, "It is our policy not to take any cases except through Scottish or UK solicitors." He read that part to me, I recall, and probably some other parts. I don't think he read the whole thing to me.

Q. Then what discussions did you have with Mr. Newman and/or Mr. McDonald about sending a letter out directly to the victims or the families of the victims?

A. Well, seemed like that was the next day or day before I was leaving to go back, which I left to go back to the United States on the 21st. Maybe that was about the 20th. That's my best estimate of time. I don't know what day it actually went out. He did mention it to me and I again objected and he again said he talked with John. I believe he got on the phone and we discussed it. I said, I suggested at first, "Let's just don't mail it." Then Kelly assured me it had the statement in there that all that was asking the victim to do was to send us, to let him know the name of the solicitor or have the solicitor contact him I believe is the way he put it; and I don't believe that letter was read to me either and I agin did not feel like I had the power to say, "Kelly, do this or don't do this," but I said, "Do what you think, whatever you think is right about it." I did object.

***

KELLY LEE NEWMAN

having been called as a witness and previously duly sworn, testified as follows:

BY MR. SMOOT:

***

Q. (By Mr. Smoot) Okay. You had a phone call then?

A. The phone rang. That was Ben Musslewhite calling from London and as I recall he talked to Mr. McDonald first. Mr. McDonald either read it or explained it to him over the phone. I don't recall for sure if he read it word for word or just explained it and then I got on the telephone and I had talked to Ben Musslewhite and made it clear to him that the ad said we're only dealing with solicitors and not victims and when I assured him of that, he then made a statement, "Well, Kelly, you make the decision. I'll leave it up to your discretion." He said, "I have some reservations or hesitation about it." He had some misgivings but in the final analysis he left it up to my decision.

***

Further Testimony of Benton Musslewhite:

THE WITNESS: Four is the letter signed by Mr. Newman to all victims, families of victims of the Occidental Petroleum platform disaster.

Q. (By Mr. Pinson) All right, sir. Do you have any knowledge as to where that letter was disseminated to?

A. Well, Kelly told me. He discussed it with me. He told me that it was being mailed to a list of victims' names that Mr. McDonald had obtained.

Q. Did he read it to you?

A. No, he didn't read it to me. I told him as he testified that I was opposed to it. I didn't think he ought to send it under the circumstances. He assured me it had a caveat

in there that said -- we want -- the purpose of the letter was to have solicitors to contact him. I said, "Well, if you feel comfortable with that, I'll leave it up to you to decide whether or not it's appropriate to do, you and John."

Q. Was that the specific wording that you insisted on?

A. Yes, he told me that was in there.

Q. Okay. Did you review the rest of the wording on the letter?

A. I was in London. They were in Scotland. That's the conversation we had by telephone.

Q. Okay.

A. I did not see the product before it went out.

***

Q. All right. Now going to the ad that Mr. Newman took out, which was signed by him, but not the advertisement in the papers, that's number 6 -- no, I'm sorry, number 5. Who was that directed at?

A. Well, if you read it, it's certainly obviously directed to solicitors or to victims to have their solicitors contact Mr. Newman.

Q. All right. And in connection with that ad, I believe you've testified that you did not give a substantial revision to Mr. Newman's work product?

A. No. As I said, or was going to say, he talked over the telephone as we did about his letter. I objected. I said I don't think you ought to send the letter, run the ad. It's just too much hassle right now. He read

to me from both of them a statement, a caveat, a disclaimer which said we were not going to be taking cases except through Scottish or UK solicitors. I said, "Well, if that's in there you decide what you're going to do. I'll leave it up to you."

Q. Was Mr. Newman in any way being compensated for you for doing all this?

A. No. No, he's an independent lawyer. We're both independent of each other.

App. DD-1
[Excerpts from]

"Texas Lawyer"

Compulsory Membership Violates Lawyers' Rights

In a state that prides itself on rugged individualism and right-to-work laws, the existence of the State Bar of Texas as a compulsory professional organization is an anomaly.

Particularly ironic, of course, is that those who direct the Bar quite often are attorneys from large firms that represent the employers of non-organized workers and which fifht tooth and nail any semblance of union rights or due process in the work place.

Even worse, this past year has shown how State Bar officials abuse their prerogatives by squandering Bar dues to travel to luxuruous hotels, eat sumptuous meals and consume staggering amounts of liquor. In fact, this group spent more on personal amenities than a farm worker family of five can earn in two months of stooping in the hot

sun, facing dangerous pesticides. And, undoubtedly, there were some personal tax write-offs involved, but not for the farm workers.

Bar dues would have been better spent on providing pro bono legal services to improverished Texans, rather than reinforcing the negative image under which lawyers already labor.

Further, the State Bar uses membership dues to support its own ideological activities, especially in the legislative forum, which are quite often at odds with what public interest lawyers believe is appropriate for those whom they represent.

***

These are some of the reasons why 19 states have abolished the unified bar and why a Wisconsin federal court this year decided that compulsory membership violated attorneys' First Amendment rights of free speech and free association (*Levine v. Supreme Court of Wisconsin*).

The Wisconsin district court particulary focused on using bar dues for a legislative agenda, distinguishing an earlier Supreme Court ruling, which had upheld the Wisconsin unified bar 12 years earlier for other easons (*Lathrop v. Donohue*), principally for purposes of discipline and professional competence.

Even the fact that Wisconsin Supreme Court allowed attorneys to deduct that part of their dues that the bar used for its legislative purposes could not save the bar.

***

Conceptually, a State Bar should have three purposes. First, it should discipline errant attorneys (and in such a way as to inspire confidence from the public). Secondly, the Bar should provide regular, meaningful training. Third, it should set admission standards.

The last function already is handled by the Texas Supreme Court, and the other two would be better served by creating a special agency under the direction of the courts, as

other states have done.

In each area, the State Bar of Texas is currently deficient. The heavy hand of discipline rarely falls against the large firms. And, because those firms have disgraceful equal employment records, minority attorneys have to go it on their own, exposing themselves to greater mistakes that routinely would be avoided under the tutelage of a firm with many experienced lawyers.

***

James C. Harrington is legal director of the Texas Civil Liberties Union. His commentaries, which appear regularly in Texas Lawyer, *are personal views and do not necessarily reflect the position of the TCLU.*

EXHIBIT DD-2
[Excerpts From]

"Texas Lawyer"

January 2, 1989 - Vol. 4, No. 39

Ruling Invites Scrutiny of How Firms Hustle Corporate Clients

By Richard Connelly And Diane Burch

Now that John O'Quinn's high-profile constitutional challenge to the State Bar rules has been forcefully rejected by the Texas Supreme Court, his disciplinary suit may turn into a nasty, prolonged and eye-opening look at how prominent Texas firms and attorneys do business.

The 7-1 ruling, issued Dec. 14, found no basis for O'Quinn's arguments that Bar rules banning solicitation of accident victims by so-called "runners" were overbroad and a violation of commercial free speech guarantees.

***

O'Quinn's attorneys were not completely unhappy with the rebuff, however, citing a section in the majority opinion by Justice

William Kilgarlin that hinted the justices thought the Bar might be engaging in selective prosecution of O'Quinn, a prominent Houston trial lawyer accused of hiring runners.

In language that drew pointed criticism in two concurring opinions, Kilgarlin wrote for the majority that the ardent wooing of corporate clients is not disciplined by the Bar despite it being the equivalent of soliciting accident victims.

"One need only read the occasional stories in newspaper business sections to be aware that sophisticated solicitation by law firms of corporate clients occurs more than infrequently," Kilgarlin wrote. "What one will not read in newspapers, but what allegedly exists, is monetary kickbacks to insurance claim managers or fee cutting in bidding wars to obtain corporate clients .... [K]ickbacks and bidding wars are just as demeaning to the legal profession as unseemly solicitation of personal injury clients, even when no client, corporate or personal injury,

complains."

O'Quinn's attorneys say that the court's opinion gave direction to 189th District Judge Richard Millard, who will hear the disciplinary suit, when Kilgarlin wrote: "Without a development of facts by the trial court, however, this court cannot pass upon the question of whether the disciplinary rules are constitutionally infirm because of the apparent inequality in their enforcement."

"Now that is what the case is about and the Supreme Court has given the trial court that guidance, and us as well, so now we know how to proceed with the case," said Luther Soules III, name partner in San Antonio's Soules & Wallace and a member of O'Quinn's high-powered defense team. "The opinion would have been extremely misleading without that sentence in there."

Although Soules said a gag order limited him to general comments on the opinion, filings in the suit indicate the strategy O'Quinn's team is likely to take. The defense

has filed notice it intends to take at least 115 depositions, including those of all current and former directors of the State Bar who have served since the suit was filed in 1986, and all members of the local grievance committee that heard the original grievance.

The deposition notices, along with the filing of a lengthy compilation of news articles dealing with wining and dining of potential corporate clients, indicate that O'Quinn's attorneys will be asking the directors "how they get their business," as one attorney familiar with the case said. In-person contacts not prosecuted as solicitation apparently would be noted in arguments about selective enforcement.

The court's stated interest in corporate solicitation opens the subject as a legitimate area for discovery and makes it more difficult for the Bar to argue, as expected, that the case should be limited to proving the specific allegations against O'Quinn, said the attorney, who asked that he not be identified.

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Neither side would comment on the potential for an out-of-court settlement. Court documents filed before a March 17 stay of all lower-court proceedings indicate that O'Quinn was ready to accept a public reprimand. O'Quinn's Feb. 19 reply to the Bar's motion for summary judgment says "a meeting of the minds clearly existed" between O'Quinn and the Bar over a settlement.

Court documents indicate O'Quinn offered to settle for a public reprimand and 18 months of cooperation with Bar authorities, to include his testifying in cases against solo practitioners Benton Musslewhite, accused of solicitation, and Newton Schwartz, accused of mishandling clients' funds. The Bar, for its part, would assist in getting O'Quinn immunity from any federal or state prosecution.

APP. EE
(Excerpts)

NO. 14-89-00041-CV

*

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
AT HOUSTON, TEXAS

*

BENTON MUSSLEWHITE,
Appellant,

versus

THE STATE BAR OF TEXAS,
Appellee.

*

Appeal from the 270th Judicial
District Court of Harris County, Texas
- No. 86-44452 and 87-24402

*

APPELLANT'S BRIEF

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POINTS OF ERROR

I.

POINTS OF ERROR CONCERNING PIPER ALPHA ALLEGATIONS

POINT OF ERROR ONE

The District Court erred in failing to construe DR 2-101 in such a manner as to make it inapplicable to the communications in the press release, the advertisement and letter to victims, because such communications were ultimately directed solely to U.K. Solicitors (lawyers) and not to victims and the State Bar utterly failed to show that the Solicitors were incapable of making a reasonable verification of any statements contained in such communications. (See, Pre-Judgment Motion for Rehearing, Supp. TR and TR 65, par. C, 1(c); TR 67, par. 4; TR 75, par. B; TR 77, par. G(i); TR 67, 83, 84; TR 104, 105, par. B; TR 108, par. E, F 109; TR 112, 113, pars J and K; TR 128 to 130, par. (iv), (v), (vi), (vii), (viii); Supp. Tr., Appellants Requested Findings of Fact and Conclusions of Law; TR 27-29, 32-35 of Appellant's Orig. Ans.; SF 19, 20, 25, 26,

31-34, 38-39, 50, 58, 60, 65, 68, 76-78, 119, 120, 189, 195, 203-205, 244, 247, 250, 255-259, 264, 265, 327, 404, 409, 410).

POINT OF ERROR TWO

Because of the manner in which the State Bar is attempting to construe and apply DR 2-101, the Court below erred in failing to hold that such Disciplinary Rule is unconstitutional because it is unreasonably vague and a reasonable attorney, such as Appellant, would have no way of realizing that the State Bar would attempt to apply it to communications from Appellant to other attorneys, such as the U.K. Solicitors. (See Pre-Judgment Motion for Reconsideration, Supp. TR; see TR pages cited under Point One above and TR 60; TR 65, par. (c); TR 68, par. 4; TR 75, par. B; TR 77, par. G(i); TR 79-82; TR 82-84; TR 104-105, 108-113, 127-131, 133, 140 Orig. Ans., TR 27-29, 32-35; and Motion for Continuance and Request for F.O.F. and C.O.L. in Supp. TR).

POINT OF ERROR THREE

If the Court below correctly construed DR

2-101, then the Court below erred in failing to hold that DR 2-101 is unconstitutional as written and/or as applied, in violation of the First Amendment to the Constitution of the United States and Article 1, Section 8 of the Constitution of the State of Texas, because:

a. All such communications (in the press release, advertisement and letter to victims) were ultimately directed solely to U.K. Solicitors and not to victims.

b. Such U.K. Solicitors were not shown by the State Bar to be incapable of reasonably verifying the statements contained in the communications in question.

c. The intended audience of such communications (U.K. Solicitors) were, as a matter of law, sufficiently "sophisticated" to reasonably verify the statements contained in such communications.

d. The State Bar did not establish that it had any proper and substantial governmental and/or police power interest in regulating public communications from one

lawyer to another.

e. All such communications were true on their face and the State Bar did not prove that there was any history demonstrating that such types of communications from one lawyer to other lawyers were likely, from a historical point of view, to render non-lawyers susceptible to fraud, duress and/or overreaching.

f. Even if the State Bar had shown (which it did not) that there was a substantial governmental interest in regulating communications from one lawyer to other lawyers, the State Bar failed to prove that the regulation of such communications would directly advance such governmental interest, if any.

g. The State Bar failed to prove that the attempted regulation of communications from one lawyer to other lawyers was not more extensive than was necessary to further any alleged governmental interest.

h. In any event, on the basis of the Record before this Court, it was undisputed

that such communications were not false and misleading. (See TR 113-127; as to all of the above, see references under Points One and Two and especially see TR 129, 139).

POINT OF ERROR FOUR

The District Court erred in entering the Judgment Revoking Probation on the basis of the Piper Alpha allegations because the Findings of Fact made by the Court below (Findings Nos. 4-42, TR 166-172; Nos. 34-113, TR 182-192) are not sufficient to support the Judgment Revoking Probation, even if such Findings of Fact were supported by evidence (which they are not). (See Appellant's Requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing in Supp. TR; Motion for New Trial, TR 104-105, 108-131; and all the SF references under Point One above and under Points Six, Seven and Eight below).

POINT OF ERROR FIVE

The District Court erred in entering the Judgment Revoking Probation based upon the Piper Alpha allegations because the material

Findings of Fact with respect to the Piper Alpha episode and the alleged violations of DR 2-101, the advertising rule (See Findings Nos. 4-42, TR 166-172 and Nos. 34-113, TR 182-192), are:

a. Not supported by any evidence.

b. Not supported by sufficient evidence.

c. Such findings are against the great weight and preponderance of the evidence.

d. Not supported by the pleadings.

(See, Appellant's requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Reh. in Supp. TR; Motion for New Trial, TR 104-105, 108-131; and SF references under Points Six, Seven and Eight Below).

POINT OF ERROR SIX

The District Court erred in granting the Judgment Revoking Probation on the basis of the communications contained in the press release because:

a. For all the reasons stated under Points One through Five above.

b. Even though it was undisputed that the press release was handed out to the few

reporters who were present at the press conference, there was no evidence that the statements in the press release were ever printed in a newspaper or broadcast on an electronic media or any other media described in DR 2-101. (See TR 111, 112, 127, 128).

c. It was undisputed that the statements contained in such press release were not false and misleading. (SF 30-37, 52, 53, 126, 127, 131, 133, 137, 187-190, 192, 193, 201, 202, 205, 206, 238-242, 252, 255, 273-281, 315-326, 330-340; also all the references under Points Four and Five above and TR 82-84, 104-105, 108-131; the Requested F.O.F. and C.O.L. in Supp. TR; and SF 25-39, 67, 68, 249, 250, 256-259, 268, 269, 287, 288).

POINT OF ERROR SEVEN

The District Court erred in entering the Judgment Revoking Probation on the basis of the communications contained in the advertisement in question, because:

a. For all the reasons stated under Points One through Five above (and see references below).

b. There was no evidence that Kelly Newman was acting as the agent of Appellant or in such a way so as to render Appellant responsible for the advertisement in question - in fact, it is undisputed that Kelly Newman was not acting as the agent of the Appellant when the advertisement was run. (In addition to the cites below, see also SF 15-18, 48-51, 57-65, 76-76, 117, 118, 198, 199, 278, 286).

c. It is undisputed that the statements contained in the advertisement are true and correct. (See SF references under Point Six (c) above; see also all the references under Points Four, Five, and Six above and see SF 49, 53, 64-70, 268, 284, 285 and re no agency, SF 15-18, 48-51, 57-65, 75-76, 117, 118, 198, 199, 276-278, 286).

POINT OF ERROR EIGHT

The District Court erred in rendering the Judgment Revoking Probation on the basis of the communications contained in the letter to victims sent by Kelly Newman because:

a. For all the reasons stated in Points One through Five above. (See references

below).

b. The State Bar did not offer any evidence to show that the statements contained in the letters were ever placed in the public domain, that is published in a newspaper, broadcast over TV or radio or other public media as is defined in DR 2-101. (See references below).

c. The State Bar offered no evidence to establish that Kelly Newman was acting as the agent of the Appellant when the letter to victims was sent - in fact it was undisputed that he was not acting as his agent or in such a manner as to make Appellant responsible for the sending of such letter (See SF references under Point Seven b. above and see TR 109-111, 128 especially).

d. The doctrine enunciated by the United States Supreme Court in the recent case of Shapero v. Kentucky Bar Assn., 100 L.Ed.2d 475 (1988), expressly authorizes a letter such as the one written by Kelly Newman. (See references below).

e. All statements contained in the

letter are true and correct. (See SF references under Point Six (c); see also references under Ponts Four, Five and Six above and SF 50, 51, 70-72, 75, 77, 135, Deft. Exh. 13, 409, 264, 265, 268, 279).

POINT OF ERROR NINE

The District Court erred in rendering the Judgment Revoking Probation on the ground that the Appellant did not disclose in the communications complained-of that he was under probation and the terms of such probation, because the moment such disclosure became relevant - such as when any Solicitor approached Appellant about potential employment - it is undisputed that Appellant made full and complete disclosure about the probation and the terms of such probation. (See SF 14, 16, 17 23, 34, 42-44, 62, 63, 73, 74, 121-125, 240, 241, 259, 260, 271-276, 322; Appellant's requested F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR and references to TR under Points One-Five above).

POINT OF ERROR TEN

The Distict Court erred in not granting Appellant's Motion to Abate Proceedings with respect to the Piper Alpha allegations, and in proceeding with the revocation trial even though such allegations had not been processed through the grievance committee and the Appellant given a right of trial by jury in the district court, all as guaranteed him and all lawyers of the State of Texas by Sections 10-24 of Article X of the State Bar Rules, and the District Court's failure to do so constituted:

a. A violation of Sections 10-24 and other sections of the State Bar Rules.

b. A violation of the due process rights of the Appellant under the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 19 of the Constitution of the State of Texas, as well as the Open Courts provision of the State of Texas, Article 1, Section 13, of the Constitution of the State of Texas. (See Appellant's requested F.O.F. and C.O.L. of Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Orig. Answer, Plea in Abatement, TR 23-26; Motion for New Trial, TR 60, 65, 74, 105-107, 133; and Motion for Injunction, TR 149, 150).

POINT OF ERROR ELEVEN

Aside from the fact that all the communications complained-of are true and not false and misleading, such communications did not violate DR 2-101 (A)(1), DR 2-101 (a)(4) and the other provisions of DR 2-101, because:

a. They were not "material" representations, particularly in view of the fact that they were directed to U.K. Solicitors who could make reasonable verification of same.

b. None of the statements were made in the public media with the consent of Appellant or by a person acting as his agent.

c. The intended audience of such statements, namely U.K. Solicitors, were sophisticated enough to make reasonable verification of the statements therein made and, therefore, under no circumstances could they constitute proper violations of any advertising rules such as DR 2-101 (See references under Points One-Five above).

II.

POINTS OF ERROR PERTAINING TO THE REFERRAL CLAUSE

POINT OF ERROR TWELVE

The District Court erred in entering the Judgment Revoking Probation on the basis of the Referral Clause because it is undisputed that the Hartmans were not new clients of the Appellant inasmuch as they were already his constructive clients prior to November 1, 1987, the commencment of the one year that the Referral Clause was in effect. (See Original Answer, TR 30, 31; Appellants' Request for F.O.F. and C.O.L. in Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 89, 90; Pltf Exh. 10; SF 234, 290, 291).

POINT OF ERROR THIRTEEN

The District Court erred in entering the Judgment Revoking Probation on the basis of the Hartman case because, utilizing appropriate rules of construction (particu-

larly those pertaining to custom and usage, the penal nature and effect of the Referral Clause, construing same to be constitutional and reasonable, construing same against the scrivener and construing same so that it will be legally valid), it is clear that the District Court erred in failing to construe the Referral Clause in such a way that it was consistent with the manner in which Appellant actually referred the Hartman case to Wayne Mansulla. [Orig. Answer, TR 31, 32; Supp. Answer TR 37, 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rhearing, Supp. TR; Motion for New Trial, TR 64-65, 82, 86-89, especially 90-103; SF 441-444, 234, 235, 323, 355, 338, 359, 372, 297, 380-386, 388, 397, 398, 169, 173-176, 297-301, 304-309, 213-216, 218, 219, 354, 360, 369, 373=375, 313, 314, 335, 336, 373-375).

POINT OF ERROR FOURTEEN

The District Court erred in rendering the Judgment Revoking Probation on the basis of the Hartman case because the Referral Clause

is unconstitutional under the Vagueness Doctrine and, therefore, Appellant's rights under the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 19 of the Texas Constitution were violated. (Orig. Ans. TR 31, 32; Appellant's Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Supp. Answer, TR 37-38; Motion for New Trial, TR 64, 65, 77, 82, especially 85-89, 90-103, 132-135; Request for Injunction, TR 149-151 especially; and see all cites to SF under Point Thirteen above).

POINT OF ERROR FIFTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Hartman case because, if the State Bar is correct in its interpretation of the Referral Clause, said clause is void because it is in fatal conflict with DR 2-107 (the State Bar has taken the amazing position that a lawyer can receive a referral fee without being "employed" as an attorney and this interpretation directly conflicts with DR

2-107 which requires a lawyer to be "employed" in order to receive a referral fee). (Supp. Answer, TR 37, 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Request for Rehearing, Supp. TR; Motio for New Trial, TR 60, 61, 86-88, especially 90, 91, 99, 100; Motion for Injunction, TR 150, 151; SF 355-358, 363, 365-369, 376, 379).

POINT OF ERROR SIXTEEN

The District Court erred in rendering the Judgment Revoking Probation on the basis of the Referral Clause because such clause is void and of no effect in view of the fact that it constitutes the imposition of a form of punishment not permitted under Sec. 23(A) of Art X of the State Bar Rules (a sanction which says Appellant can take no new cases for one year unless he refers them out is not a punishment listed in the State Bar Rules and any judgment imposing a non-listed sanction is void to that extent). (Supp. Answer, TR 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Request

for Rehearing, Supp. TR; Motion for New Trial, TR 67, 68, 85, 86; Motion for Injunction, TR 150, 151; SF 344, 345, 351, 352).

POINT OF ERROR SEVENTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because such Clause resulted from an agreement between Appellant and the State Bar and, since it restricted Appellant's law practice, it violates DR 2-108 and is therefore void. (Supp. Answer, TR 38; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 67, 85; Motion for Injunction, TR 150, 151; SF 421, 422, 423).

POINT OF ERROR EIGHTEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because it is undisputed that Appellant did indeed refer the Hartman case to one Wayne Mansulla in a manner consistent with the Referral Clause. (Orig.

Answer, TR 31, 32; Appellant's Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motio for New Trial, TR 87, 88, 90-99, 99-100; especially see SF cites under Points Twelve and Thirteen above; Pltfs Exh 11; and SF 54, 55, 145, 146, 288, 289, 292-296).

POINT OF ERROR NINETEEN

The District Court erred in granting the Judgment Revoking Probation on the basis of the Referral Clause because the Appellee was estopped from asserting such matter as a ground for revocation since the Custodian appointed by the Court had been advised by Appellant of the Hartman referral and the facts surrounding same; said Custodian had advised Appellant that he had "no problem" with the manner in which Appellant was referring the Hartman case to Mansulla; and Appellant relied upon the acquiescence of the Custodian, to Appellant's detriment. (See Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 100, 101; SF 232,

233, 234, 282-284).

POINT OF ERROR TWENTY

The District Court erred in granting the Judgment Revoking Probation based upon the Referral Clause because the material Findngs of Fact with respect to said Clause (See Findings Nos. 43-48, TR. 172, 173 and Findings Nos. 1-32, TR. 176-182):

a. Even if correct (which they are not), do not support a judgment of revocation on the basis thereof.

b. Are not supported by any evidence.

c. Are not supported by sufficient evidence.

d. Are against the great weight and preponderance of the evidence.

e. Are not supported by the pleadings. (See Orig. Answer, TR 31, 32; Appellant's Requested F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR; Motion for New Trial, TR 103; SF cites under Points Twelve, Thirteen, Fifteen, Sixteen, Seventeen, Eighteen and Nineteen above).

III.

VIOLATION OF NOTICE RULES AND ABSENCE OF PROCEDURAL DUE PROCESS

POINT OF ERROR TWENTY-ONE

The District Court erred in overruling Appellant's Motion for Continuance; in proceeding with the revocation hearing in the face of the fact that Appellant had only five days notice of the Revocation trial; and in entering the Judgment Revoking Probation on the basis of such trial because:

a. The Court violated Rule 99, T.R.C.P., which requires that the party defendant in a new proceeding be given until the first Monday after the expiration of twenty days (after service of process) in which to appear and respond.

b. The Court violated Rule 245, T.R.C.P., which requires at least ten days notice before setting a contested case for trial (after the defendant has appeared).

c. Under Texas law the action of the Court proceeding without the requisite notice to Appellant rendered the proceedings, and

the judgment rendered thereon, void and of no effect.

d. The Court abused its discretion in overruling the Motion for Continuance.

e. The Court erred in failing to grant Appellants special exceptions complaining of the failure of Appellee to allege the specific disciplinary rules on which it relied in its efforts to revoke Appellant's probation.

f. The action of the Court in proceeding with the Revocation trial with only five days notice to the Appellant and at a time when Appellant had no counsel; without forcing the Appellee to specifically allege the disciplinary rules on which it relied; and without giving Appellant time to complete important discovery, violated Appellant's due process rights under the Fourteenth Amendment to the United States Constitution and Article 1, Sect. 19 of the Texas Constitution. (See Motion for Continuance, Supp. TR; Orig. Ans., TR 26, 27; Motion for New Trial, TR 62, 63; Request for Injunction, TR 15 of Appellant's

Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR).

IV

FAILURE TO GRANT SUPERSEDEAS

POINT OF ERROR TWENTY-TWO

The District Court erred in failing to grant the Appellant a stay of the suspension and/or a supersedeas pursuant to the terms and provisions of Rule 47, T.R.A.P., for the following reasons:

a. The District Court should have construed Section 24 of Article X of the State Bar Rules in *pari materia* with Sections 22 and 26 of Article X of the State Bar Rules, so as to conclude that any attorney against whom a judgment of suspenson has been rendered has a right to supersede that judgment of suspension in accordance with Rule 47 of the T.R.A.P., unless such attorney has been convicted of a felony or crime of moral turpitude in accordance with Sec. 26 and/or has been shown to be "an immediate and irreparable threat of harm to his clients and

potential clients", in accordance with Section 22.

b. If the Court below is correct in the manner in which it construed Section 24 of Article X of the State Bar Rules, then Section 24 is thereby rendered unconstitutional as written and/or as applied, because it violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Sections 13 and 19 of the Texas Constitution.

c. Also, the District Court failed to provide procedural due process to the Appellant with reghard to a supersedeas because it refused to conduct and hold a hearing on the question of whether or not the Appellant was entitled to supersedeas before it summarily suspended Appellant pending appeal and, therefore, Appellant did not have a fair opportunity to establish his right to supersedeas pursuant to Rule 47, T.R.A.P. (See Request for F.O.F. and C.O.L., Supp. TR; Pre-Judgment Motion for Rehearing, Supp. TR;

Motion for New Trial, TR 55-62, 140; Motion for Injunction, TR 149, 153, 158-160; SF 464-471, 169-173, 177-178, Vol. IV, p. 31, 12, 91, 92, 108-117).

V.

EXCESSIVE PUNISHMENT

POINT OF ERROR TWENTY-THREE

The District Court abused its discretion in assessing punishment of three years suspension; moreover, assessment of such punishment under the circumstances of this case is unconstitutional under the Eighth and Fourteen Amendments to the United States Constitution and Article 1, Section 19 of the Texas Constitution; this cause should be reversed and remanded and this Court should reduce the punishment, if any, to what is proper under all the circumstances of this case. (See Pre-Judgment Motion for Rhearing, Supp. TR; Motion for New Trial, TR 77-82, 131 especially; SF 281-284, 10, 11, 210-212, Vol. IV, 9, 13-26, 28-33, 38-49, 51-65, 99-110).

App. EE
[Excerpts]

STATEMENT OF THE CASE

This case involves an appeal from a judgment of suspension of the Appellant attorney ("Judgment Revoking Probation"). The Appellant had entered into a disciplinary settlement with the Appellee in January of 1988 ("Agreed Judgment"). The Agreed Judgment provided for a three-year probation of Appellant. In September of 1988, the Appellee filed a suit to revoke the probation and, on November 21, 1988, the Court below revoked Appellant's probation and entered the judgment suspending Appellant for a period of three years. Appellant has perfected a timely appeal from the Judgment Revoking Probation.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The proceeding below is a shocking collage of unconstitutional abrogations. As an attorney, Appellant had no special rights over other citizens to constitutional protections but he certainly was entitled to

no less rights. Due process, and Appellant, were crucified on the cross of some indefinable goal[1] which was personified by excessive zeal and an abuse of power. The proceedings made the basis of this appeal were commenced in total disregard of the "first Monday after the expiration of twenty days" requirement of Rule 99, T.R.C.P.; the ten-day notice requirement in Rule 245, T.R.C.P.; and just plain fundamental procedural due process as defined in the landmark case of Roller v. Holly, 176 U.S. 398 (1899).[2]

The primary thrust of the suit to revoke centered upon three communications (a press release, an advertisement and a letter), all relating to the Piper Alpha disaster which were, on their face, ultimately directed only to Solicitors and lawyers and not to victims or the general public.[3] Yet, without blinking an eye, the Court below - at the urging of the State Bar and in clear derogation of the First Amendment of the U.S. Constitution as articulated in Bates v. State Bar of Arizona,

433 U.S. 350, 53 L.Ed. 2d 810 (1977), (hereafter "Bates"); Zauderer v. Office of Disciplinary Counsel of Ohio, 471 U.S. 626, 85 L.Ed.2d 652 (1985), (hereafter "Zauderer"); Re R.M.J., 455 U.S. 199, 71 L.Ed.2d 64 (1982), (hereafter "R.M.J."); Shapero v. Kentucky Bar Assn., 100 L.Ed.2d 475 (1988), (hereafter "Shapero") and Article 1, Sect. 8 of the Texas Constitution - suspended the Appellant's license to practice law for three long years on the basis of those three pieces of communicatons. Moreover, Appellant's constitutional right to have the Piper Alpha allegations processed through the grievance committee procedures, with eventual right to trial by jury, was denied by the Court below, in violation of Sections 10-24, Art. X of the State Bar Rules and the principles enunciated by the Supreme Court of the United States in the celebrated case of Logan v. Zummerman Brush Co., 455 U.S. 422, 71 L.Ed.2d 265 (1982) (hereafter "Logan v. Zimmerman"). Furthermore, DR 2-101, as construed by the Court below, was rendered

unconstitutional under the Vagueness Doctrine.

The second, and only other, ground asserted by the State Bar as a basis for revocation, was that Appellant violated a provision in the Agreed Judgment which allowed him to take new cases during the first year of probation only if Appellant referred such cases to other lawyers (the "Referral Clause"). The State Bar took the bizarre position that Appellant violated the Referral Clause because he became "employed" as an attorney before he referred the case in question to another lawyer, even though the State Bar conceded that Appellant could receive referral fees out of all referrals made during that year. Despite the fact that the State Bar's position clearly contravened DR 2-107, which requires a referral lawyer to be "employed" as an attorney, and further violated the Appellant's due process rights under the Vagueness Doctrine, the Court below also based the three-year suspension on the alleged violation of the Referral Clause.

In addition, the imposition of three years' suspension, based solely upon alleged hypertechnical violations of the advertising rule (DR 2-101) and the Referral Clause in the Agreed Judgment, may very well have violated the Eighth Amendment's (and Art. 1, Sect 13, of the Texas Constitution) prohibition against excessive fines and punishments, as well as Appellant's due process rights.

And last, but certainly not least, the Court below - without any police power basis for doing so - refused to allow Appellant to supersede, pending appeal, the three year suspension. Such refusal constitutes another cumulative violation of Appellant's constitutional rights. Thus, the State Bar has gotten its pound of flesh even though it had to repeatedly ignore the Constitutions of the State of Texas and the United States in order do so.

What this appeal is really all about though, is the right of free speech as guaranteed by the First Amendment to the

United States Constitution and Article 1, Sect. 8 of the Texas Constitution. As General George Washington warned the officers of the Continental Army in the cold winter of 1783, "the freedom of speech may be taken away, and dumb and silent we may be led, like sheep to the slaughter." The undisputed evidence in this case established that a number of competent Scottish Solicitors were genuinely concerned that a small group of Solicitors in Aberdeen, working with another group of American lawyers, were attempting to forge a group settlement of the Piper Alpha claims for grossly inadequate amounts (120,000 pounds per family). Appellant's press conference, according to some of the Scottish Solicitors, helped thwart that effort. Appellant's method - having a press conference concerning potential jurisdiction in Texas - may not be a method of which many members of the Court would personally approve, but, as Justice Oliver Wendell Holmes admonished us, the greatest constitutional imperative is that we must

protect the freedom of others to express the thought and speech "that we hate". U.S. v. Schwimmer, 279 U.S. 644, 653 (1928).

Appellant's press conference constituted his freedom of expression of how to best deal with the situation at hand. It was a method that Appellant had used before, e.g. the Ocean Ranger tragedy. And it was this method - of directing all public statements about potential litigation in the U.S. only to the Solicitors and lawyers in the area, with the caveat that Appellant would not accept any cases except through such Solicitors and lawyers - that was clearly protected by both the Constitutions of the United States and the State of Texas.

What is really at the bottom of this inquisitorial prosecution is not any perceived violation of DR 2-101 - the General Counsel's Office knows full well that what Benton Musslewhite did in Scotland was constitutionally protected. What they are really after is the unorthodox, the outspoken, the non-conformist, the activist,

the crusader, the unpopular, the politically liberal, the aggressive lawyer - the lawyer who really does seek to implement the mandate of EC 8-3 to educate members of the public "to recognize the existence of legal problems" and to provide "methods for the intelligent selection of counsel".[4] And what could be a better method of fulfilling Appellant's responsibility under EC 8-3 than that employed by Appellant in the Piper Alpha situation - a public urging that victims hire their own Solicitor, known to them, and have that Solicitor verify statements of American lawyers about potential American jurisdiction, comparative amounts of recovery, qualifications, contingent fees to be charged, and the like.

But the General Counsels' Office does not like that method. So, with a "casual indifference to the gravity of (the) injury inflicted upon an attorney, "Zauderer, 85 L.Ed.2d at 684, the General Counsel's Office and the Court below proceeded, "under the guise of prohibiting professional misconduct

(to) ignore constitutional rights." See NAACP v. Button, 371 U.S. 415, 439, 9 L.Ed.2d 405 (1963).

***

However, one thing is crystal clear - if this Court does not agree with us about the proper construction of the Rules and Judgment, then it muist declare them unconstitutional as applied and/or as written. To be sure, the cumulative effect of the various desecrations of Appellant's constitutional rights in this case makes a mockery of the Due Process Clause and the First Amendment.

AMENDED POINT TWENTY-THREE AS CONTAINED IN SUPPLEMENTAL BRIEF OF PETITIONER FILED IN STATE COURT OF APPEALS

The District Court erred in failing to dismiss the petition to revoke and/or to deny revocation of probation because - leading up to and commencing with the prosectuion of Appellant in the underlying disciplinary action, to and through those revocaton proceedings - Appellant has been the victim of unconstitutional violations of the Due

Process and Equal Prtection Clauses of the U.S. and Texas Constitutions, including unconstitutional selective prosection, impermissible persecution based upon Appellants use of press conferences and rights of free speech, deprivation of rights to which he was entitled by state law and the U.S. and Texas Constitutions, unconstitutionally excessive punishment and other forms of violation of the Equal Protection Clause, and because the State Bar failed to meet the burden of persuasion and/or going forward with the evidence which had shifted to it, to prove that its prosecution of Appellant, and not others, or others with far less zeal, who were similarly situation, was rationally related to some legitimate state purpose and did not constitute invidious discrimination. (See pleadings; Motion for Injunction, Motion for Change of Venue, Motion for Continuance and Motion for New Trial, Orig. TR 17-82, re pretrial publicity; Orig. TR 149-158, re new violations, absence of trial by jury,

financial arrangements, Equal Protection generally, conduct of Custodian, etc; Orig. TR 160-165, re specific allegations of selective prosecution and enforcement; Orig. TR 189-190, re Equal Protection; Orig. TR 183, 187, 191-194, re free speech; 1st Sup. TR, 14, 15, 18, 22, 23, 32, re "selective enforcement", 34, 35, free speech, 73, 74, 124 and 126, re Equal Protection and Due Proces generally).

Supreme Court, U.S.
FILED
NOV 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BENTON MUSSLEWHITE
PETITIONER

V.

THE STATE BAR OF TEXAS,
RESPONDENT

On Writ of Certiorari
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

PRELIMINARY STATEMENT

On November 10, 1987 Honorable Solomon Casseb, Jr. ("Judge Casseb") called the disciplinary actions against Musslewhite to trial. The underlying disciplinary actions accused Musslewhite of three serious client neglects, attempting to pay off a complaining witness, communicating with a party represented by counsel, solicitation through the use of runners, and improper selling off of fee interests. Petitioners in those actions, the Grievance Committees for the State Bar District Nos. 4-A and 4-C, State Bar of Texas, appeared by counsel and by the District 4-C Grievance Committee chairman, and Musslewhite appeared in person and by counsel. Counsel for

Petitioners announced ready for trial and counsel for Musslewhite announced not ready for trial. After Judge Casseb overruled Musslewhite's motion for continuance along with various other dilatory motions, Musslewhite sought to enter into settlement negotiations. Judge Casseb permitted the parties to discuss prospective settlement and the parties thereafter announced to Judge Casseb in open court a settlement of the disciplinary actions.

On January 29, 1988, Judge Casseb signed a Judgment in conformity with the agreement of the parties. The Judgment provides in pertinent part:

> IT IS THEREFORE ORDERED that Respondent be suspended from the practice of law for a period of ninety (90) days beginning on November 1, 1988, and ending on January 30, 1989.
>
> IT IS FURTHER ORDERED that the

Court may upon written request of Respondent showing good cause and with recommendation of the custodian, hereafter enter an order delaying commencement of the ninety (90) days suspension until no later than August 1, 1989.

IT IS FURTHER ORDERED that Respondent shall not practice law or represent himself to be an attorney during the ninety (90) day suspension.

IT IS ALSO ORDERED that Respondent be suspended from the practice of law for a period of three (3) years.

IT IS FURTHER ORDERED that imposition of the three (3) year suspension shall be suspended and Respondent shall be placed on probation for a period of three (3) years commencing on February 1, 1988, and ending on February 1, 1991, under the following terms and conditions during the term of probation:

1. Respondent shall not commit professional misconduct as defined by the State Bar Rules art. X, §7;

2. Respondent shall accept no new employment by clients until November 1, 1988, although Respondent may refer potential clients to other attorneys;

3. Respondent shall furnish on or before March 1, 1988 to the Court, counsel for Petitioners, and Hartley Hampton to a full and complete list of all clients, along with their addresses and telephone numbers, as well as a full and complete list of all lawsuits in which Respondent is an attorney of record, including cause and court numbers and a brief description of the status of each lawsuit;

4. Respondent shall furnish all open client files as requested by Hartley Hampton by March 1, 1988;

5. Respondent shall fully cooperate with Hartley Hampton in the performance of his duties hereinafter set forth; and

6. Respondent shall fully cooperate with the State Bar of Texas in furnishing all information, knowledge, and documents concerning other attorneys committing professional misconduct.

On July 19, 1988, the court-appointed custodian over

Musslewhite's law practice, Hartley Hampton, and the State Bar of Texas, by and through its Office of General Counsel, filed a Motion to Conduct Oral Hearing with respect to Musslewhite's activities concerning the Piper Alpha tragedy in Scotland and concerning the filing of the Hartman lawsuit. Judge Casseb thereafter set such motion for hearing for September 18, 1988. Judge Casseb also ordered that the movants be permitted to engage in discovery. After discovery, the State Bar of Texas filed its Motion to Revoke Probation on September 12, 1988. Such motion raised the same issues as in the prior motion.

On September 20, 1988, Judge Casseb commenced receiving evidence on the Motion to Conduct Oral Hearing and then on the Motion to Revoke Probation. At

the conclusion of proceedings on that day, Judge Casseb continued the matter over to October 17, 1988. On October 17 and 18, 1988, Judge Casseb received all the evidence Musslewhite or his counsel had to offer concerning the Motion to Revoke Probation.

By letter dated October 19, 1988, Judge Casseb granted the Motion to Revoke Probation, permitted Musslewhite to participate in a certain trial, and suspended Musselwhite from the practice of law for three (3) years, beginning December 1, 1988. On November 7, 1988, Judge Casseb heard Musslewhite's motions to conduct hearing on punishment, to reconsider, for rehearing and reconsideration, and to delay imposition of suspension. Judge Casseb overruled Musslewhite's motions, and suspended

Musslewhite from the practice of law for three (3) years, beginning January 31, 1989, so that Musslewhite could participate in a certain trial.

On November 21, 1988, Judge Casseb signed an Order Revoking Probation and Imposing suspension for three (3) years, commencing January 31, 1989. Judge Casseb signed Findings of Fact and Conclusions of Law on December 27, 1988, and December 29, 1988.

Musslewhite is currently appealing the revocation order in the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, Houston, Texas. Many of Musslewhite's arguments (See Petitioner's Brief pp. 52-64) are the same ones being made in the lower state court and cannot be considered by this Court. In addition, Musslewhite

argues the issue of selective prosecution by the State Bar of Texas and attempts to inject exhibits which are not a part of any court's record. Although Musslewhite attempted to supplement the record with these exhibits and to file a supplemental brief with respect to selective prosecution with the Court of Appeals, his motion was denied by the state court of appeals on October 5, 1989. Thus, the issue may not be considered by this Court. Exhibits I (1-32) through P; S through X; and AA (1-3), BB (1-2), CC, DD, EE should be disregarded in their entirety.

ARGUMENT AND AUTHORITIES

Musslewhite argues that the trial court should have granted his request for supersedeas pursuant to Rule 47,

Tex.R.App.P. 47 provides in part:

> Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk . . . . (Emphasis added).

Art. X, Sec. 24, State Bar Rules, provides as follows:

> Either party to a disciplinary action shall have the right of appeal to the Court of Appeals but, if the judgment appealed from be one suspending or disbarring the respondent, be or she shall not be entitled to practice law in any form while the appeal is pending and shall have no right to supersede the judgment by bond or otherwise. (Emphasis added).

Musslewhite argues that either (a) Section 24 should be read in conjunction with Sections 22 and 26 of the State Bar Rules or (b) Section 24 is unconstitutional.

His first argument is based on some theory that the meaning of Section 24 is

not clear. Section 24 is clear, unambiguous, compulsory, and constitutional. The rule simply provides that lawyers, such as Musslewhite may not practice law pending appeal of their suspension or disbarment. This statute specifically addresses the status of a lawyer who has been suspended from the practice of law during pendency of the appeal. No discretion to override this statute is granted to any court. Thus Judge Casseb was correct in denying Musslewhite's motion. Judge Casseb not only had no duty to permit Musslewhite under any terms to secure a stay of his suspension, Section 24 clearly establishes that Musslewhite has no right to practice pending appeal. Judge Casseb did not even have any discretion

to abuse.

Musslewhite contends that to establish the meaning of Section 24, it must be read along with Art. X Section 22 of the State Bar Rules. Section 22 by its very terms has nothing to do with an attorney subject to a trial court's final order of suspension or disbarment. Section 22 permits an immediate interim suspension, similar to a temporary injunction "pending the final disposition of a disciplinary action . . . ." (See App. 3 for Text) A Section 22 interim suspension protects the public during the course of a grievance matter against a lawyer found to be an immediate threat to the public, whereas Section 24 protects the public from a lawyer suspended or disbarred after trial. Art. X §26 of the State

Bar Rules provides for compulsory discipline of a lawyer who has been convicted of a serious crime.

The rules cannot mandate Section 24 be construed in pari materia with Sections 22 and 26. Lawyers are suspended and disbarred for reasons other than conviction of crimes or threats to the public. In fact, most lawyers are suspended and disbarred for reasons other than having been convicted or because they are threats to society. Thus, Section 24 specifically contemplates those lawyers who are suspended and disbarred for reasons other than constituting irreparable harm and/or being a convicted felon.

In addition, Section 22 provides a mechanism for suspension throughout the process when the lawyer is shown to be

an imminent threat to the public. Likewise, Section 26 provides its own mechanism for dealing with lawyers who are appealing their criminal convictions and mandates that they be suspended while doing so.

Thus, Section 24 not only covers the above-mentioned situations but also all other situations in which lawyers have been suspended and disbarred. There is absolutely no implied conflict between these sections.

Musslewhite argues that if one does not read the sections together then Section 24 must be unconstitutional. In support of this position, he states that disciplinary actions are penal in nature. But the Texas case of Bryant v. State, 457 S.W.2d 72 (Tex.Civ.App. Eastland 1970, writ ref'd n.r.e.),

states otherwise. The court in Bryant held:

> A license to practice law is not such a property right as is immune to such regulation. . . . Such proceedings are not penal in nature. They are not taken for the purpose of punishing the attorney. They are civil.

The cases cited by Musslewhite to characterize the right concern affording a lawyer procedural due process prior to revoking or suspending of his license. They have no applicability to a lawyer subject to a trial court's final order of suspension or disbarment. Musslewhite was clearly afforded due process during the revocation proceeding.

More importantly, when dealing with attorney discipline, the primary concern is protection of the public. Lack of public confidence in the integrity of the bar overrides any policy that would

permit an attorney who has been duly found by a trial court of competent jurisdiction to have committed professional misconduct to continue to practice law pending appeal of their suspension or disbarment.

To do so would have adverse effects upon the profession. The same concerns which apply to a lawyer who has been convicted of a crime can be applied here. Clients unaware of the disbarment of suspension may retain the attorney and unwittingly compromise their rights. Adversary counsel aware of the sanctions may be reluctant to negotiate with the attorney, to enter into a settlement with him, to entrust him with an escrow fund or to be associated with him of counsel. When the judgment is affirmed, the client may be forced to

employ new counsel who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client. U.S. v. Friedland, 502 F. Supp. 611 (D.C.N.J. 1980). But most important, a lawyer who predicts defeat in his appeal has little to lose and may engage in additional serious misconduct toward any remaining clients for his own personal gain. The State Bar might add that it is as confident of its prevailing on the merits as is Musslewhite. The incentive for a lawyer to continue to violate ethical standards when facing defeat on appeal is great. Thus, to allow a lawyer to continue to practice after suspension or disbarment jeopardizes the rights of innocent clients and the justification for Section 24 is

abundantly clear. In Musslewhite's own case, the probated suspension began on January 31, 1989, and yet less that eight (8) months later Musslewhite had already violated the provisions of probation.

Thus, Musslewhite has no constitutional right supersede the suspension order pending exhaustion of appeal. The no supersedeas rule is analogous to a lawyer being suspended by operation of law pending appeal of a criminal conviction for a serious crime. In both instances, the lawyer may eventually secure appellate reversal and therefore practice law again, but the confidence of the public and the bar compels that lawyers convicted of serious crimes, and lawyers suspended or disbarred after trial of a disciplinary

action, must be suspended pending appeal.

> The practice of law is a license, not a right, and only persons of good moral character and fitness are permitted to practice law in the courts of this state. An attorney who is convicted of the enumerated crimes cannot hold the confidence of the public or the profession as long as the conviction stands.

State Bar of Texas v. Heard, 603 S.W.2d 829, 834 (Tex. 1980). Musslewhite is in no better position. In fact, should Musslewhite be permitted to practice pending appeal, and should appeal eventually favor the State Bar, at the Texas Court of Appeals, the Supreme Court of Texas, and/or the United States Supreme Court, Musslewhite may effectively avoid most of his suspension.

Musslewhite's attempt to analogize his situation with that of Texaco/Pennzoil is misplaced. The

Second Circuit case dealt with the essential elements necessary in bringing a 1983 action. In addition, the issue in Texaco was that of a denial of a fair opportunity to obtain an adjudication on the merits of an appeal. In Texaco, the posting of the bond would have destroyed the entity itself. Here Musslewhite retains every opportunity to appeal his case and every opportunity to continue to earn a living - albeit not in the field of law. If the judgment to revoke is reversed, the sole harm to Musslewhite is the deprivation of his privilege to practice law or its monetary equivalent. His complaint is nothing more than that of loss of economic earning power.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Application for Certiorari is denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

Linda A. Acevedo
Assistant General Counsel

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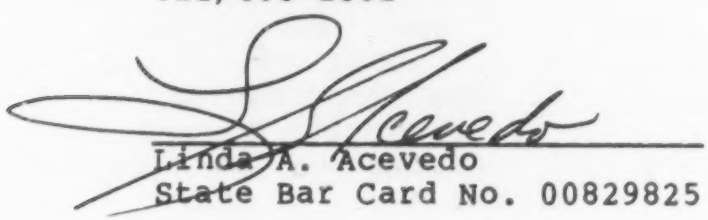
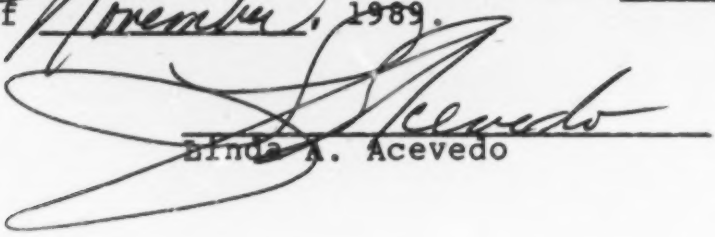


Linda A. Acevedo
State Bar Card No. 00829825

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Benton Musslewhite, pro se, 1535 Mellie Esperson Bldg., 815 Walker, Houston, Texas 77002, by delivery of a true and correct copy to him by certified mail, return receipt requested, by depostiting same, enclosed in a post-paid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 3rd day of November, 1989.



Linda A. Acevedo

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(5)

NO. 89-555

*

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1989

*

BENTON MUSSLEWHITE,
Petitioner

VS.

THE STATE BAR OF TEXAS,
Respondent

*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

*

PETITIONER'S REPLY TO BRIEF OF RESPONDENT AND SUPPLEMENTAL APPENDICES

* * *

Benton Musslewhite
Pro Se
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Houston, Texas 77002
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I.

Respondent in effect admits it has not carried its burden to show a valid state ground for blanket ban on supersedeas.

It is crucial to note that the Respondent, in its Brief filed in this Court, has not in any way contradicted Petitioner's assertions that he has never been charged with any crime or act involving moral turpitude; that he has never posed a threat of harm to his clients or the public; that Respondent offered absolutely no evidence in the state courts which would establish any valid state ground for denying Petitioner supersedeas pending his appeal on the merits; and that the state appellate courts are stringing out his appeal so that his three year suspension will virtually be over by the time he wins his appeal.

Based on Respondent's Brief, both

Petitioner and Respondent[1] agree that Sec. 24, Art. 10 of Texas State Bar Rules, as written, prohibits supersedeas for every Texas lawyer suspended by a trial court, regardless of the "circumstances." Sec. 24 "takes no prisoners". Since it does not contain any provisions mandating that the appeal be expedited, it totally nullifies the great majority of appeals by lawyers suspended by the trial court because the period of suspension in most of those appeals will be less than the time it takes to complete the appellate process in the state courts (2 to 2 1/2 years).

---

[1] The Respondent states that "Sec. 24 not only covers the above-mentioned situations (harm to clients or convicted felon), but also all other situations in which lawyers have been suspended or disbarred" (p. 12 and 13, Resp.'s Bf.; emph. ours). Respondent further states that "(n)o discretion to override this statute (Sec. 24) is granted to any court . . . Judge Casseb (the trial judge) did not even have any discretion to abuse" (p. 10, 11; emph. ours).

Petitioner's case is a classic example of just how devastating Sec. 24 can be. Petitioner was suspended January 31, 1989 and supersedeas was denied. The Texas intermediary appellate court, because it had the discretion to do so, denied Petitioner's motions to accelerate and expedite his appeal on the merits. It now appears that the intermediate appellate court will not set Petitioner's case for oral argument until May, 1990 (see affidavit of Ms. Kathryn Diaz, attached as App. FF, Supp. App.). Thus, it now seems probable that more than 2 1/2 years of total suspension time will go by before the appellate process can be completed in the state court system.

By virtue of this vicious vise - the combination of the enforcement of an unconstitutional blanket ban on supersedeas and the unconstitutional stringing out of Petitioner's appeal-

Petitioner's right to appeal from the unjust three year suspension has been effectively nullified. But, the Respondent says that all this is permitted under the Constitution because "lack of public confidence in the integrity of the bar overrides any policy that would permit an attorney who has been duly found by a trial court to have committed professional misconduct (no matter how constitutionally flawed that trial is) to continue to practice law pending appeal of their suspension . ." (p. 15, Resp.'s Bf.; emph. ours). In other words, according to the State Bar of Texas, destroying the law practice, professional standing and family life of every lawyer suspended by a trial court is more important than trying to construct a reasonable supersedeas statute (which most assuredly can be done) that would protect both the rights of the public and the suspended lawyer pending an

appeal that he or she will probably win.

The substance of Respondent's argument is that because the suspended attorney might just possibly do something wrong pending appeal[2], such attorney should not be allowed supersedeas under any circumstances. We hasten to point out that the Respondent did not offer one iota of evidence in the state courts which would even tend to show that there is an inherent probability that lawyers suspended by a trial court will do any of the things it only speculates about in its "unsupported assertions" before this Court.

This kind of response to the critical issue of the constitutionality of Sec. 24

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[2] The Respondent states that clients unaware of the suspension 'may' compromise their rights; adversary counsel 'may' be reluctant to negotiate with the suspended attorney; or that the suspended lawyer 'may' predict defeat and thereby engage in additional serious misconduct (pp. 15 and 16, Resp.'s Bf.; emph. ours).

is fatal to Respondent's position. In an analogous situation, this Court, in holding that a blanket ban on the use of illustrations in attorneys' advertising was unconstitutional, stated that:

> "The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban . . . . Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations . . simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified . . . ."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648, 649, 85 L Ed 2d 652, 671 (1985); emph. ours.

Respondent, by its own Brief, has

conclusively demonstrated that it did not, has not, will not and can not meet its burden to offer more than "unsupported assertions" about how the Respondent has a valid state ground for imposing a blanket ban upon all supersedeas' for suspended Texas lawyers.

II.

The Respondent erroneously minimizes the value of the right to practice law and seeks to uphold an invalid "classification," in violation of the Equal Protection Clause.

It is hard to believe that any bar association would manifest the calloused and materialistic attitude toward its members as that expressed in the last statement in the Brief of Respondent that the "sole harm" to Musslewhite (by enforcement of Sec. 24) "is nothing more than that of loss of economic earning power." (p. 19, Resp.'s Bf.; emph. ours.)

The Respondent further asserts, that the Texas courts take the view that the

"practice of law is a license, not a right" (p. 14, 17 and 18, Resp.'s Bf.).[3] But this is flatly contrary to the law expressed by this Court. After stating that lawyers "cannot be prevented from practicing (law) except for valid (state) reasons" the Court ruled that "the practice of law is not a matter of the State's grace." Schware v. Board of Bar Examiners, 53 U.S. 232, 238, 1 L Ed 2d 796, 801 (1957); emphasis ours. See also Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L Ed. 224 (1963); Board of Regents v. Roth, 408 U.S. 564, 33

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[3] The Texas state courts' cavalier attitude toward professional people was further manifested in Sizemore v. State Board of Dental Examiners, 759 S.W.2d 114 (Tex. Sup. 1988). The lower court had correctly observed: ". . . the right to practice a profession has been called a property right, but it is more . . . it takes from him his professional standing and, in a manner, whatever good name he has, which leaves him poor indeed . . . ." 747 S.W.2d at 389. Sadly, the Texas Supreme Court rejected such rationale.

L Ed 2d 5488 (1972); In the Matter of John Ruffalo, Jr., 390 U.S. 544, 20 L Ed 2d 874 (1968); and Zauderer 85 L Ed 2d at 684 (Brennan, J. stated, that lawyers' rights also involve "a person's good name, reputation, honor, and integrity"; 85 L Ed 2d at 684).

The contrary philosophy of the Texas State Bar and Texas Supreme Court explains how they could so blithely adopt a state bar rule (Sec. 24) which possesses such destructive force.[4] Since it views

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[4] As we have explained to some extent in the Petition, pp. 5-8, 16, 32-34, and see App. R, the consequences of Petitioner's suspension pending appeal have been brutal and catastrophic. They have had, and continues to have, devastating impact upon the Petitioner's financial well-being, professional standing, reputation, honor, associations in the community and, most important, upon his clients and family. This irreparable harm is cumulative on a geometrically progressive basis. For example, the longer the suspension, the harder it is to start-up the Petitioner's law practice again; the more the stigma accumulates; and the greater the reluctance of old clients, unions and referring attorneys to

lawyers' rights as being confined to "economic earning power" and ignores those humanitarian concepts of reputation, honor, integrity and similar intangible considerations, such philosophy breeds unconstitutional values, rules and actions. The sad truth is that the persecution of Petitioner is but a symptom of a deeper illness in the State Bar of Texas - a cancer of materialism and greed that has metastasized in its very soul.

The question arises as to whether a state, if it permits supersedeas to its citizens generally, can constitutionally deny supersedeas to a subsidiary group of its citizens without having valid state reasons for doing so. This Court answered this question in Lindsey v. Normet, 405 U.S. 56, 31 L Ed 2d 36 (1971). There, the Court struck down, as a violation of the

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do business with Petitioner when he does finally vindicate himself.

Equal Protection Clause, an Oregon provision that required a losing tenant in a landlord-tenant case to post a supersedeas bond of twice the amount of the rent expected to accrue pending an appellate decision and to forfeit such amount to the landlord if the trial court decision in the landlord's favor was affirmed. This Court observed that, once a state provides appellate review to its citizens generally, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause" and that a statute which "heavily burdens" appeals of a certain group by making supersedeas difficult or impossible, violates the Equal Protection rights of such group. 31 L Ed 2d at pp. 52 and 53.

And this is what Sec. 24 does, but with substantially greater burden on the burdened group. Rule 47 of the Tex.

Rules of App. Proc. grants the right of supersedeas generally to all civil litigants and defines the procedure for obtaining a supersedeas bond in all types of cases. Such statutory supersedeas scheme thus, as stated in Lindsey, invokes the Due Process and Equal Protection Clause of the U.S. Constitution and precludes the state from arbitrarily or capriciously denying such supersedeas to any group of its citizens. But Sec. 24 carves out a class (lawyers suspended by a trial court) and not only imposes upon it a substantially greater burden than was imposed in Lindsey, but abolishes its right to supersedeas altogether. There is no doubt that, under Lindsey, Sec. 24 violates the Equal Protection Clause.

And in Bankers Life and Casualty Co. v. Crenshaw, 100 L Ed 2d 62 (1988), this Court upheld a Mississippi penalty statute but, in doing so, distinguished

Lindsey, stating that the bonding requirement in Lindsey was "unrelated" to the thing (accrual of rent) being protected; that it "burdened only tenants" and thus erected "a substantial barrier to appeal faced by no other civil litigant in Oregon"; and "bore no reasonable relationship to any valid state objective." 100 L Ed 2d at 75; emph. ours.

The blanket ban on supersedeas effectuated by Sec. 24 bears no relationship to anything - certainly not to any "valid state objective". Sec. 22 of Art. 10 of the Texas State Bar Rules does bear a reasonable relationship to valid state objectives because it provides a mechanism for protecting, on an interim basis, the public just from those lawyers who threaten harm to it, without wreaking havoc upon every lawyer who is the subject of a disciplinary proceeding. But,

unfortunately, as the Respondent proudly points out in its Brief, Sec. 24 does not limit its scope to those who might come within the provisions of Sec. 22 or Sec. 26 (providing for interim suspension when a lawyer has been convicted of a crime of moral turpitude).

Instead, Sec. 24 is the epitome of overbreadth. As the Respondent brags, without a sign of remorse, Sec. 24 applies not only to lawyers who might be subject to valid state grounds for interim suspension, such as those articulated in Secs. 22 and 26, but "also all other situations in which lawyers have been suspended" (p. 13). These would include those to whom the no-supersedeas rule, combined with the length of time for appeal, poses not only a "substantial barrier" to their appeal, but renders their appeal utterly meaningless and hopeless. Thus, under this Court's

explanation of Lindsey in the recent case of Bankers Life v. Crenshaw, there simply is no possible way the blanket ban in Sec. 24 can pass constitutional muster. See also Williams v. City of Oklahoma, 395 U.S. 458, 23 L Ed 2d 440 (1969); Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L Ed 2d 265 (1982); Griffin v. Illinois, 351 U.S. 12, 100 L Ed 891 (1955) and Evitts v. Lucey, 469 US 387, 83 L Ed 2d 821 (1985).

Also important to the questions presented in this Petition is Freedman v. Maryland, 380 US 51, 13 L Ed 2d 649 (1965). There, this Court struck down a motion-picture censorship statute because, once it was invoked, the censored party could not show the film pending judicial review no matter, no matter how "protracted" that judicial review might

be.[5]

In this case, a fatal flaw in Sec. 24 is that it does nothing to protect the lawyer who eventually wins his appeal on the merits. It does not contain a "specified brief period" for resolving the appeal or a mandate that the appeal must be accelerated and determined within the "shortest fixed period compatible with sound judicial resolution." Indeed, what is happening to Petitioner exemplifies

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[5] This Court stated: "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution . . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Without these safeguards, it may prove too burdensome to seek review of the censor's determination." 13 L Ed 2d at pp. 654, 655 (emph. ours).

precisely why a statute such as Sec. 24 must be struck down. See also Chicago Teachers Union v. Hudson, 475 U.S. 292, 89 L Ed 2d 232 (1986); F.E.C. v. Mass Citizens for Life, 479 US 238, 93 L Ed 2d 539 (1986) and National Socialist Party v. Village of Skokie, 42 US 43, 53 L Ed 2d 96 (1977). In Skokie, as in this case, the state courts had both denied a stay of enforcement (same as denial of supersedeas) and an expedited appeal and the Court held that the denial of both violalted the constitutional rights of the appellant.[6] Thus, Skokie makes it clear

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[6] In Skokie, this Court stated pertinently: "It finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review which, in the normal course, may take a year or more to complete. If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, Freedman v. Maryland, 80 U.S. 51 (1965), 13 L Ed 2d 649, 85 S Ct 734, including immediate appellate review, see Nebraska Press Assn. v. Stuart, 423 U.S.

that the procedural safeguards mandated in Freedman include the right of "immediate appellate review" and makes it clear that the double whammy inflicted upon Petitioner in this case - no supersedeas and no acceleration of appeal - violates Petitioner's constitutional rights.

III.

This Petition Presents Important Questions For Review Which Deserve Resolution by This Court.

There is no doubt that Sec. 24 is unconstitutional as written and that the enforcement of that statute, combined with the denial of an accelerated appeal (see App. B, W, F and X), makes it unconstitutional as applied in this case. Petitioner hopes that this Court will, as in Skokie, dispose of this matter in per

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119, 1327 (1975) (Blackmun, Jr., in chambers). Absent such review, the State must instead allow a stay. The order of the Illinois Supreme Court constituted a denial of that right."

curiam fashion and grant the supersedeas and/or order the state courts to grant supersedeas. However, the issues presented in this case are substantial in breadth and depth and deserve resolution by this Court. They affect all professional persons and all state agencies who purport to regulate professional persons and, indeed, the scope and importance of the constitutional issues here involved obviously extend far beyond the rights of such persons and entities and has some impact upon all citizens.[7]

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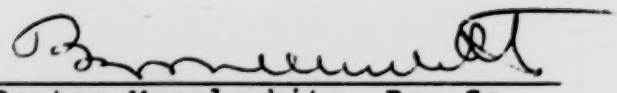
[7] The Respondent's Brief contains a number of disingenuous statements, not the least of which is its characterization of the underlying disciplinary proceedings in a manner inconsistent with what subsequent discovery and events have made clear is the truth. While the viability of those allegations is not directly relevant to the issues here, Petitioner would like to mention, having had the honor of appearing before this Court (Chick Kam Choo v. Exxon, 108 S. Ct. 1684 (1988), that it is all the more embarrassing and frustrating to suffer through Respondent's repetition

of these comments. Suffice to say that the deposition excerpts of Ms. Barham and Ms. Merritt, the two lead so-called "serious neglect" cases, attached as App. GG in the Supp. App., demonstrate that their complaints boiled down to nothing more than alleged unanswered telephone calls. Respondent does not even accept such complaints for filing with regard to other lawyers (App. L). As to the "solicitation" allegations, Petitioner eagerly agreed to allow the Custodian to examine every one of his files to determine if any had been improperly solicited (App. Q). The Custodian did not find a single case that had been improperly solicited (see App. R). Moreover, the General Counsel for Respondent finally admitted that Respondent did not have a viable case with regard to the "solicitation" allegations (App. I-30). The Respondent's statement that the Motion to Conduct an Oral Hearing "raised the same issues" as the petition to revoke, p. 5, Resp. Bf., simply is not true (compare App. T, petition to revoke, alleging violations of the advertising rule to newly attached App. HH, the Motion to Conduct an Oral Hearing, alleging violations of the in-person solicitation rule). What this continued distortion by Respondent and its malicious prosecution in the revocation proceedings has caused Petitioner to do, is to file a direct attack on the Agreed Judgment, by way of a Bill of Review in the Texas state court (see App. II, Supp. App.).

Respectfully submitted,



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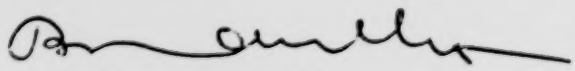
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been forwarded to all counsel of record by placing same in the United States Mail, first class, postage prepaid on this the 16th day of November, 1989.



Benton Musslewhite

APPENDIX FF

AFFIDAVIT OF KATHRYN DIAZ

THE STATE OF TEXAS *

COUNTY OF HARRIS *

BEFORE ME THE UNDERSIGNED AUTHORITY, appeared Ms. Kathryn Diaz, known to be, who, after first being duly sworn, did upon her oath state, swear and affirm as follows, to-wit:

"My name is Kathryn Diaz. I am familiar with the facts and matters stated herein, and make this statement under my oath. I am a third year law student at South Texas College of Law. I was formerly employed by the law offices of Benton Musslewhite and I was requested by Mr. Musslewhite to investigate and determine what the normal length of time is for the processing of a civil appeal in the Fourteenth Court of Appeals of the State of Texas. That Court and the Clerk's office of that Court are located in the same building which houses the South Texas College of Law.

I discussed such situation with Ms. Barbara Elliott and others of the office of the Clerk of the Fourteenth

Court of Appeals, and from such discussions, as well as further investigation, I can now state that the average and normal length of time, with respect to appeals in the Fourteenth Court of Appeals, are as follows: the Fourteenth Court will, on the average, set a civil appeal for oral argument approximately nine months to one year after the briefs have been filed by both parties; following oral argument, the Court will normally take several weeks to several months to render its decision and file its opinion; the length of time for rendering the decision and filing the opinion varies in accordance with the complexities of each case."

S/ Kathryn Diaz
Kathryn Diaz

SWORN TO AND SUBSCRIBED BEFORE ME THE UNDERSIGNED AUTHORITY, this the 3rd day of November, 1989.

S/ Joan H. Hays
Notary Public in and for the State of Texas

My Commission Expires:

10/19/92

APPENDIX GG

NO. 86-44,452

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF
	*	
	*	
VS.	*	HARRIS COUNTY,
	*	TEXAS
	*	
	*	270TH JUDICIAL
BENTON MUSSLEWHITE	*	DISTRICT

DEPOSITION OF

MARTHA BARHAM

July 9, 1987 Houston, Texas

DEPOSITION OF MARTHA BARHAM

taken on the 9th day of July, 1987, at 11:00 a.m., before Mary L. Johnson, a Certified Shorthand Reporter in and for the State of Texas, in the law offices of Eugene R. Hoyt, 3555 Timmons Lane, Suite 1010, Houston, Texas 77027, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

- - - - -

A P P E A R A N C E S:

For the State Bar Association:

Mr. Steven M. Smoot
First Assistant General Counsel
1414 Colorado Street
Austin, Texas

For Benton Musslewhite:

Pro Se
609 Fannin, Suite 517
Houston, Texas 77002

On the 9th day of July, 1987, at the law offices of Eugene R. Hoyt, 3555 Timmons, 10th Floor, Houston, Texas, MARTHA BARHAM appeared before me, Mary L. Johnson, Certified Shorthand Reporter in and for the State of Texas, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

- - - - -

MARTHA BARHAM,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. MUSSLEWHITE:

Q Okay. Would you state your full name,

Mrs. Barham?

A Martha Belle, B-e-l-l-e, Barham.

Q All right. And where do you now reside?

A 801 Alma, Tomball, Texas.

A . . . See, I've been arrested before. And, I --

Q Well, I appreciate your candor. I'm going to have to ask you about that.

A It doesn't bother me because, you know, I really was stupid and didn't know what I was doing, and I really didn't get in trouble. I got a probation for it. . . .

I met a girl there named Willie May Porter. She was 28 years old and had two children. And she made a life of -- you know how some people, they have a life that is illegal all the time. . . She said that she had been charging things at different stores and under $20 or $10, there is an amount

that . . .I would give her names of people that had credit of other stores.

Q I see. And she was using their names?

A Uh-huh. Or else if she came there--that's how it started out at first--she would just come to that one store and I would okay the credit.

Q Well, what you're saying is you got led down the primrose path by this woman?

A Well, I shouldn't. It was wrong, and I knew it was wrong, but I didn't know, you know, that people were thrown in jail and handcuffed and trials, I didn't know all that. I didn't know-- I had never --

Q Did someone finally catch up on what was going on and had you arrested?

A Yes. . . .

A I went to court and I was put on five years probation.

Q All right. So you pled guilty, no lo

contendre, or what?

A No, I pled guilty.

Q What did you plead guilty to?

A It was a felony, theft, or something like that. . . .

Q So you came back? How did you get the money to come back?

A Well, no. I got arrested again.

Q What for this time?

A Well, as -- when I grew up, my parents believed in sparing the rod would spoil the child, so we were whipped continuously by my aunt and by my father. Every little thing we did wrong -- and I remember one time I did stand up to my father, because they had a psychiatrist talk to me, and he just folded his papers -- but I just -- I didn't let anybody run over me. The first time I stood up to my father and my aunt. So he was not going to let me come back. We got in a fight and he

hit me and I stabbed him.

Q What did they charge you with?

A Assault with a deadly weapon.

A . . . And then I was 21 when I was--so this is -- in '63 my father came out to Oakland to get me because I stabbed Homer Taylor real bad. I'd like to have killed him.

Q A second time?

A No. I stabbed my husband the first time in the arm, . . .

Q He did not die?

A No, he did not die. . . . I remember I told him there in that little place we were painting, "I don't want to live here. I want to go home. I don't know -- you know, if you'll just help me get home," and I remember he threw a lamp at me and cut my hand real bad, the light bulb did. And he tore up all my clothes, even cut up an ironing board, and he was just -- "You're not

leaving," and standing in front of the door. And I went and got a knife and . . . . You know. And then his brother-- I don't know if they were going to let me stay there or not. All I know is that he turned his back. He was standing in front of the door and when he turned around, I stabbed him in the back with the knife and he fell on the floor.

Q They did not charge you on that case?

A Yeah, they charged me, but then --

Q The same thing, assault with intent to kill?

A And then I met Leon, my last husband in 1970.

Q That was Leon Barham.

A Uh-huh.

Q And you married him when?

A We never did get married . . . .

Q All right. You mentioned something about having shot Mr. Barham. When did

that happen?

A Well, after -- we had a little bit of problems there with his drinking because I -- I still got upset 17 years later about him being drunk as I did the first time.

Q Okay.

A And we were together quite a while before I actually got the feel of --

Q Figured out --

A -- being abusive and figuring out if he was on drugs or not. . . .

A So, at this time Leon was on drugs and I didn't know it.

Q All right.

A So, the first time I shot him, Carey was a little over a year old.

Q What was it -- I mean, was he drunk?

A He was drunk and he pulled a gun on me because he said I was supposed to pick him up somewhere -- it was all wrong. Everything that I was supposed -- he

made -- he came in mad at me because I didn't do something that I didn't know I was supposed to do.

Q I see.

A And he had this automatic pistol.

Q Uh-huh.

A And he was saying, "I ought to kill you," and I was real scared . . . . He laid the gun down to answer the telephone and when he did, I grabbed it and shot him . . . .

Q Was there another shooting incident?

A Well, I went to work. His sister helped me to get a job at Monterrey House right after that . . . Oh, before I shot him, he had pulled a knife on me. We were moving around a lot. We were always getting evicted from everywhere we lived . . . . The second time I shot him --

Q Was that after the second baby or before?

A No. No. Carey was about three years old.

Q Okay.

A And I stabbed him real bad. Because he pulled a knife on me, and -- he was drunk. He had that white stuff coming out of his mouth. I wasn't afraid of Leon. I knew him. I knew when to get scared. . . . He scuffled his money and he would maybe steal paint from Rodney and sell five gallons of paint or sell some of his father's tools or do odd jobs. He was smart at working and making money . . . . When I stabbed him, he had the knife and he cut me up. I have a big scar here, a scar down-- I was grabbing at the knife because I took the knife away from him . . . . I wasn't scared of him. And I almost cut my finger off . . . . He would just walk in and slap me out of the chair, you know, holding the baby. He

was just a -- he drank straight whiskey out of the bottle.

Q Well, you got the knife and you stabbed him.

A So I got the knife away from him and when he started to run, I stabbed him.

A . . . . So that's when his father got us the trailer. The song, "When the Roll Is Called Up Yonder,'" and he was picking on my guitar and making fun, and he was drunk.

Q I see.

A And I just had had enough, you know . . . . And I shot him that time.

Q That's the time you shot him twice?

A . . . . The police never would make him stay away from me, because they said he had a right to come in the house and--

Q Being your husband, common law --

A And they'd tell me. "Why don't you go take another pill," because I was, you know, a hysterical freak. I got to be

a mean person. I got to be hard. I was tired and weary.

Q And things were still bad; he was still drinking?

A I run -- it got to where I more or less run him off. He'd come in drunk and I'd say, "Hit the road." He got really afraid to stay with me when he was drinking . . . . I'd tell him. "Look, you better get me some money because you're going to have to leave town. Because I did shoot him twice on Breen Street. We lived on Breen, too, there on the corner in a trailer.

Q Are these times other than --

A No, this was before I left him, and this is before we got out of the trailer, because I shot him --

Q No. What I'm asking, are these times that you shot him you haven't already told me about, these other times?

A No. I shot him one more time when I

lived in that trailer . . . .

Q Well, did you -- did you have to shoot him again after that?

A Once.

Q Once. And you were still living on Breen Street?

A This was after Carey got run over . . . . I got in a cop car and I told him-- after he shot me -- my window out riding down the street -- I told him, "I want him arrested." And they said, "You got to wait until Monday," which this was probably a Friday. It always happens. To file charges, go home. And I didn't have any bullets for my gun or anything . . . . He told me, "Get out of my car or you're going to jail," and I go, "Well, you take me to jail." And they drove me around the neighborhood until I borrowed money to go get me some bullets for my gun. And, sure enough, when I went home,

there he was in my trailer.

Q What happened?

A I shot him as soon as I saw him.

Q Did he -- where did you hit him this time?

A In the leg. I shot him in the head before. he was trying to break in -- I shot him right in front of the police one time.

Q I don't -- how many times would you say -- if you can just give me an estimate and go on with this other matter-- that you shot --

A Seven times.

Q Seven times, seven different times . . . . Okay. Now, where did you meet Mrs. Eunice White?

A She lived around the corner from me on Breen Street.

Q Okay. So you all lived close by to each other all during the time you lived on --

A . . . . Ms. White and Cindy is around my age, and we were friend, and-- actually I didn't really know anyone that close . . . . So, they helped me. I ate Christmas dinner with the Whites, and they just kind of looked after me. . . . Well, I knew that they (the Whites) were always filing suits.

Q Right.

A And I think Donald Tatum, Cindy's husband, had a suit with you.

Q Well --

A I don't know what it was about, or Cindy had a suit with you. You were representing her on some little charge with Melinda Thompson's dad. They had had a family fight or something, and you were their lawyer.

Q Uh-huh. All right. Go ahead.

And so Ms. White, or Cindy, which one of them mentioned that to you?

A Mentioned your name to me? Who

mentioned your name?

Q Yes.

A Well, I think both of them together around the table.

A I went to Merrick and asked him to help me get a car.

Q That was --

A The man that ran over him.

Q Mallick.

A Mallick . . . . And I went in there. I was sort of desperate you know, and I told him I needed a car. I couldn't work. I couldn't get to the hospital. I was -- I don't know how I got to the hospital once a week. I did it. You know, I just begged, borrowed, bummed-- and he was real rude. He said, "Well, I can't do that. It's not my fault," you know. . . . and he told me right to my face that Carey could see he was going to get run over and took off running . . . . He ran in a

straight path and the truck caught him with his hand sticking out. He told me that.

Q Uh-huh.

A Then he said he wasn't going to help me get a car, that he couldn't, that he didn't really own the business. There was other people. And I thought, "Well, I've got to get a lawyer." And in my mind when you sue somebody, I was going to get a lawyer, go to court--they were bugging me for bills. . . .

Q . . . Did you get upset with Mr. Mallick and say anything that might be considered a threat?

A No.

Q There's been some indication at a time or two that maybe you did give him the feeling that you were threatening him. Would he be wrong if he said that?

A Yeah, I never threatened him . . . . And I was probably raggedy looking,

you know, 20 pounds lighter than I am now. I was probably crying. I was real bitter. I had jumped to, you know, like --

Q You were upset.

A I think I told him that I was just going to have to sue him then, that I thought he owed me some kind of help for the shape that I was in, and he had promised me . . . . But I didn't want to take any help from him at the time. . . . In fact, I was only in his office about five or ten minutes. . .

Q Were you all alone?

A Uh-huh.

Q Okay. Well, all I'm saying, some people can construe things in different ways than what people mean; and you said you were nervous, you said you were upset and a little bitter about everything because it had all happened --

A It was just grasping. I knew if I had a car I could get around. See, I was so tired of hauling this water. I had no utilities.

Q Uh-huh. And is it possible that, under those circumstances, and you answer this any way you feel comfortable --

A I don't recall threatening him.

Q I understand. Is it possible that you could have said something because you were so upset that he might have construed as being a threat? Is that possible?

A It is possible. It certainly is. Because I did --

Q You were upset.

A I did have a way of telling people, you know, to get the hell of my life. I just -- I was tired -- I was getting more and more bitter.

Q All right.

A I was having trouble with my landlord

at the time. They wanted me out. I mean, they pulled my meter out of my-

Q Is this the Breen --

A This is the Moleys. They were -- and I told Judge McElroy that, too. See, they would run down and file charges on me.

Q Uh-huh.

A Saying I cursed them and this and that. Actually they were the ones doing it.

So I paid a fine the first time. . . .

Q Uh-huh.

A Well, he put me in jail because we got in a cuss fight.

Q When was that, approximately?

A About September or October of '80, right before I hired the lawyer . . . . And that's -- so I paid the first fine, seventy something dollars. I just pled guilty.

Q To what? To misusing the water?

A Assault by threat.

Q Oh, assault by threat.

A Abuse. Yeah. Because he was -- I'd look out my back door and he'd be standing there with a shotgun.

Q Uh-huh.

A Not threatening me or anything, but Letting me see -- I mean, "You don't scare me, you S.O.B." I did curse him. I'll be honest with you, and he cursed me . . . .

Q Okay. Now, let me ask this: When did you first have contact with anybody or me or my office?

A Cindy and Ms. White -- I had discussed hiring a lawyer, and evidently you were working on a case for Donald or Cindy, and they were seeing quite a bit of you at the time.

Q . . . . I mean, they make appointments for me and I know about them, but what I'm trying to say is the first time you

met me was about three months after this first conversation; is that right?

A Uh-huh, about three months.

Q Now, that day you came to the office on Travis Street, and you actually met with me?

A Uh-huh. The first time I ever saw you.

Q Okay. And what happened at that meeting? . . . At that time did you have a release from Mr. Sherrod?

A I had everything that day because I couldn't Make very many trips. I told you that on the phone.

Q Okay. Did that include the file from Mr. Sherrod and so forth, the release from him?

A Uh-huh. Uh-huh.

Q Did you sign -- is that the day you signed the power of attorney?

A Yes.

Q Or a contingent fee agreement?

A Yes.

Q Okay. Now, after that -- I believe you told the Grievance Committee that you tried to get a hold of me a number of times and couldn't; is that correct?

A . . . . I had difficulty reaching you.

Q All right. Do you know, just so we can get some estimate, did you keep track of any times that you called or dates that you called?

A No. There would be periods where it would be every day, two or three times a day. Then things would get better for me, and it'd be months or a year before I called you.

You had told me it would be two years before we could do anything, and I was prepared to sit back quietly and wait two years, until somebody told me it was a year that the statute of limitations ran out.

Q I see.

A So I started calling you again in

August of '82 . . . . And the only way I got you to return my call then is I threatened a grievance. And you called me at Stuart and Laura's house. I was staying with them then. I had had more problems with Leon . . . . And I started calling you then. I may have asked -- I don't recall ever asking you for a draw until about the Toyota. You were supposed to help me get the side note.

Q Okay. Did you ever talk to a girl named Brenda Edwards (of Musslewhite's office)?

A Not that I know of.

Q A girl named Brenda? She has indicated that you talked to her a number of times.

A Probably have. Whoever you had working up there. It was several different people. Barbara was the main one.

Q Barbara Wilkins?

A Uh-huh . . . . You told me to come down to your office, which was on Wirt Road then.

Q Okay. Did you come down?

A Uh-huh. Chuck took me.

Q Did I dictate it (the Petition) while you were sitting there?

A Uh-huh.

Q I do that quite often. Did I dictate it while you were there?

A . . . . You said that you were in the process of moving.

Q Oh, all right.

A And the air conditioner was out. You did have boxes of files. You didn't have your office in order. I don't know when you moved in . . . . It was -- you know, you were very nice. You apologized for her . . . . And you started dictating the petition. Is that what you call it?

Q Yes.

A . . . you told Van, "Be sure you get this down by such-and-such a date," and you were really giving him orders . . . .

Q . . . . Then when did you next see me or meet me?

A You were on Fannin then.

Q Okay.

A I had tried unsuccessfully to call you.

Q And when was -- was that about the-- when you wanted the advance?

A When I wanted $200. My life was getting back together pretty good, and I had financed the car and gotten a little credit. And I had this side note when Carey had another accident. He got poked in the eye.

Q Huh-huh.

A And I called, so it had to be in '82 or '83.

Q Okay.

A '82. I called you around the latter

part of '82 because Leon was going back to prison and I was trying to see when the case was going to trial, and I wanted -- I always called and said when I moved. I had moved to Magnolia.

Q Generally were you still talking with Barbara or --

A Jane, is that her name?

Q Jane Hayes. You talked to her some?

A Yes.

Q Did you ever talk to Brenda, ever recall talking to her?

A I think so.

Q Okay. All right.

A I started having problems again in '83.

Q Okay.

A I called you.

Q All right.

A Threatened with a grievance. You called me back.

Q Well, let me ask you this: Did you-- did Mr. Leon Barham have authority from

you to call me about money?

A Well, I knew he called you.

Q . . . . So you knew that he was calling, and if I told you he was calling making some threats about money, you were not there when he did that?

A No. He didn't live with me.

Q All right. But he knew my number, so far as you knew?

A Yeah.

Q And we've got records where he called up, and people, he told this and that.

A Well, he didn't believe that I couldn't get in touch with you.

Q Oh.

A I said, "Well, you just call up there and see how hard it is to get a hold of him." And he did it, too.

Q All right. Did you ever talk to me again prior to filing your grievance, that you recall? . . . What happened on

Wednesday?

A You told me that day your bookkeeper was out, which I think you said it was Jane.

Q Okay. Was I there?

A Yes. . . .

Q Okay. Then what happened?

A I came back on a Wednesday without calling . . . . I went in and you told me you had loaned out a bunch of money and now you had to get approval from them before you gave me the $200.

Q All right.

A And you gave me $10 for gas. I was quite upset.

Q Okay.

A And I went home, and I never talked to you again until the grievance was filed.

Q All right. When you -- after you filed your grievance, did you -- there was some indication in your testimony about

-- do you recall getting a message from me or from Mr. Hoyt that I was asking him to handle the case in view of the fact that you had filed a grievance?

A Yes. I think that's the first time I talked with Mr. Hoyt, after the grievance was filed.

Q I understand that. That's why he called you, because I just felt like there might be a problem there.

There was some indication somewhere that you did not agree for Mr. Hoyt to represent you. After he talked with you, did you have any disagreement with him going forward to get the case completed?

A He told me he was going to be handling the case.

Q Well, did that -- I mean, did you have a problem with that?

A No. . . .

Q Okay. Well, whatever the medical bills

were, Judge Hoyt said that they were low compared to what -- is that what he told you, that they were low compared to what you might try to get from a jury?

A He said I'd probably end up getting nothing if I went in front of a jury, that I better take what I could get. . . .

Q Eventually did the Court appoint a guardian ad litem? do you know what I mean by that?

A . . . . Oh, yes, they did. Okay, I'm sorry.

Q That's a term before a case can be settled.

A He explained that to me.

Q Okay. You didn't have any problems with that, did you?

A What do you mean by "problems with that"?

Q With the Court appointing a guardian ad

litem. I mean, you did not disagree with that?

A No. No. It was a normal procedure, he said. They had to check my son. It was for my son's behalf.

Q That's right. Did he tell you that you can't settle a case involving a minor without getting a guardian ad litem to review to see whether it's fair?

A Huh-huh. Yes.

Q Did you ever talk to the guardian ad litem yourself?

A I met him the day of court.

Q Judge Hoyt said he recommended settlement -- I mean Mr. Hoyt; is that correct?

I call him "Judge" sometimes because he's a former judge, but his name is Mr. Hoyt.

Did he tell you he recommended the settlement?

A Uh-huh.

Q Okay. Did you eventually come -- you and Carey come to court and the settlement was approved by Judge Smith?

A Uh-huh.

Q Is that correct?

A Yes.

A I thought he (Judge Hoyt) worked in your office with you, because I talked to several lawyers in your office. In fact, there was another one that was going to represent me one time, Sobel or Sewell.

Q He did work in my office. But what I'm asking you is: He did tell you that if you didn't take the settlement and we tried it, I would try the case for you if you wanted me to; he did tell you that?

A He told me I'd probably get nothing.

Q Excuse me. Listen to my question. I'm not trying to be argumentative.

He (Judge Hoyt) did tell you, did

he not, that if you didn't take the settlement, whatever he thought about the value of the case, if you didn't take the settlement, that I would stand by my word and try the case?

A I don't recall him ever saying that to me.

Q Well, nobody ever told you I would not try the case, did they? I remember I told you I would try the case --

A Uh-huh.

Q -- when you first hired me. Nobody ever told you, "Benton Musslewhite said he isn't going to try your case"?

A No. No one ever said you would either.

Q Well, I told you I would, didn't I?

A Uh-huh.

Q . . . . In any event, Judge Hoyt, from what you're saying -- Mr. Hoyt seemed to recommend, told you that you -- he was talking about, I guess, the liability phase of the case as to the

jury might find that there wasn't any negligence on the part of Mr. Mallick. Did he tell you that?

A Uh-huh.

Q And that's why you might get nothing; is that what he told you?

A Yes.

Q . . . . But eventually it was settled after you had some difficult times getting to court, you did make it to court, you and Carey; is that correct?

A Uh-huh.

Q And the guardian ad litem was there?

A Yes.

Q And the Judge was there?

A Yes.

Q And I was there?

A Yes.

Q And Mr. Hoyt was there?

A Yes. And Mr. Ellis.

Q And Mr. Ellis for the defendant was there.

A Yes.

Q Did you -- and you did agree to the settlement?

A Yes.

Q Let's go to the first time you met me in the office.

A Uh-huh.

Q I never did tell you, "I promise you that I will get $250,000," did I, Mrs. Barham?

A You told me that you never get what you ask for, but you ask for a whole lot more than what you normally --

Q Get.

A -- get. And you were going to ask for a quarter of a million dollars.

Q In any event, all I'm just trying to say, I never did when you met me face-to-face promise you that I'd get you $250,000?

A No.

Q Well, there was some implication (in

the phone conversation) that I offered you money not a part of the settlement. That's what I'm --

A No. It was -- you told -- this is the best I can remember.

Q All right.

A You had called me after the grievance was filed but before I had testified. I think maybe it was when you first heard about it. I don't know.

Q All right.

A And you told me that you were on your way to New York.

Q Uh-huh.

A You were calling me from the airport.

Q All right.

A That the case was going to be settled in September. I think that was the first month.

Q Uh-huh.

A And that the grievance -- since I had filed a grievance, it kept you real

busy running back and forth -- that's when you asked me did I want a jury trial or just take the money from the judge.

Q Uh-huh.

A . . . . So I said, "Well, what do you think I should do?" "Well, I don't know. I'll be happy with anything you decide." I go, "Well, what would be best?" I never could get an answer from you.

Q I can't make that decision for you; but, anyway, let's not argue.

A Well, you're my lawyer. You know whether we should have a jury trial or go for the judge. I don't.

Q I gave you a recommendation, Ms. Barham, do you recall that? All I can do is recommend, and I did give you a recommendation . . . . Is that the extent of the conversation that you recall?

A Yeah, because nothing -- I was afraid you were going to ask me about the grievance, but you didn't . . . .

Q Now, were there any other conversations that you can think of that you had with me?

A No.

Q . . . . But in some of those calls leading up to that, you don't deny that Mr. Barham could have said that (threatened a grievance if a loan was not made) . . . .

A I have no idea what he said.

Q All right.

A It wouldn't surprise me, anything . . . .

Q Have you discussed that with anybody, Mr. Hoyt or, anybody else, drawing money against the fund, against the money in the registry of the court for the benefit of your son?

A Not for the benefit of my son. My son

put $2500 worth of phone calls on my phone calling his girlfriend, and I asked Mr. -- I'm still having trouble with my son, and I asked Mr. Hoyt did he think a judge would --

Q Let you recuperate your --

A Make him pay the bill. But I couldn't do that, because that's all he has, you know. I was just threatening my son with that. I go, you know, "I'll just take your money. The Judge said I could do it, and you're going to pay your $2500 phone bill."

A I was threatening him with that, and he was standing there and . . . .

Q . . . . And, as a matter of fact, the day of the settlement, your son in your presence, if you recall, asked me if he needed some money, how to do it; and I said you have to get a court order. You remember that down at the courthouse?

A Uh-huh. I told him if he put anymore phone calls, I was going to take all of the receipts to the Judge, that I had hired me a lawyer, and I was going to get the Judge to take every bit of that money and pay. He even left school and had -- went and had caps put on his teeth without my authorization, and the dentist did it. And I had to pay for that. I shouldn't have, but I did.

Q How old is he now, Ms. Barham?

A Fifteen.

Q Fifteen. I believe that's all the questions I have.

NO. 86-44,452

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF
	*	
	*	
VS.	*	HARRIS COUNTY, TEXAS
	*	
	*	270TH JUDICIAL
BENTON MUSSLEWHITE	*	DISTRICT

DEPOSITION OF

MARY ANN MERRITT

July 9, 1987 Houston, Texas

DEPOSITION OF MARY ANN MERRITT

taken on the 9th day of July, 1987, at 2:00 p.m., before Mary L. Johnson, a Certified Shorthand Reporter in and for the State of Texas, in the law offices of Eugene R. Hoyt, 3555 Timmons Lane, Suite 1010, Houston, Texas 77027, pursuant to Notice and the Texas Rules of Civil Procedure.

IT IS STIPULATED AND AGREED by and between counsel for the respective parties hereto that if the original deposition is not signed and filed at the time of trial, an unsigned copy may be used as if it were the signed original.

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A P P E A R A N C E S:

For the State Bar Association:

Mr. Steven M. Smoot
First Assistant General Counsel
1414 Colorado Street
Austin, Texas

For Benton Musslewhite:

Pro Se
609 Fannin, Suite 517
Houston, Texas 77002

MARY ANN MERRITT,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. MUSSLEWHITE:

Q First, for the record, let's -- state your full name for the record.

A Mary Ann Merritt.

Q Okay. Ms. Merritt, did you recall seeing in 19 -- early 1986 a -- or Maybe in late 1985, December of '85, an article about a case that I had been involved in and had gotten a verdict for a lady who had a gastric reduction type of operation?

A It was in approximately January or February of '86.

Q All right. And after seeing that article, did you call my office or call somebody and --

A Yes, I did.

Q And did we eventually see each other?

A Yes.

Q Then we talked by telephone and didn't we meet at this place that had the TV out there in the Village?

A Nick's.

Q Okay. And then at that meeting, did you not at that time sign some sort of power of attorney or retainer agreement?

A Yes, I did.

Q . . . . At that meeting you made it clear to me, did you not, that your operation that you then felt like it had caused you some problems had taken place more than two years before we met?

A That's correct.

Q . . . . Basically, though, what I'm saying is, at the conversation with me, you told me about the operation that

Dr. Dudrick had performed. It had Not worked. That is, it had not been successful; is that correct?

A Well, considering when I had the operation I was 105 pounds, and at that time I was a hundred and forty something, no.

Q . . . . Ms. Benage then, did you not tell me, made you aware of the fact that this doctor had not -- had possibly been the cause of you not being able to -- or, rather, it might have been negligence on his part that caused you not to have a successful operation? Do you remember discussing that, or Ms. Benage made you aware of the fact that he was being sued, and this --

A Yes.

Q -- brought to mind, "Well, maybe I've got a lawsuit"? Is that correct?

A Uh-huh.

Q And it was not long after that you talked to me; am I correct?

A Yes.

Q Okay. And after that conversation that night at the place in the Village, and you signed some sort of paper authorizing me to act, you then tried to call me on the telephone?

A Well, the point of you having me sign-- you said that you didn't know if I had a case at that point, but to go ahead and sign the power of attorney because that would save me a trip downtown in the event that I went home and found the information you told me to look for and supplied you with it, if it fell into the category that you stipulated to me, as I had understood.

Q All right. Anything else you recall about the conversation with me other than just explaining to me what happened?

A No, except that, you know, you told me to go home, and you said it was very important that I find out the last time that I had been to see the doctor.

Q . . . . I'm trying to get your recollection of what your instructions were following that meeting. to go ahead or --

A Well, it was rather haphazard. It's kind of difficult to reconstruct the meeting because there was a lot of coming and going. Basically I think we only met about ten minutes that was actual -- you discussed the discovery rule.

Q All right.

A . . . . And as I was finishing up, someone from your office called me and said that he was just touching base. I'm sorry. I don't remember his name. To see whether or not -- he was preparing the letter of notification

and he was calling to see whether or not I still wanted to pursue with the case.

A . . . . And I said, "No. I don't want anything sent out at this point." I said, "If he wants to make a deal with -- at that time I think I said John O'Quinn or, you know --

Q Right.

Q (By Mr. Musslewhite) Okay. Now, anyway, and did you not tell somebody in our office that in view of that publicity (disciplinary proceedings publicity) you'd rather I not handle the case?

A No. I said in view of all of the overall facts, mainly what had happened to me, you know, plus the gentleman calling me and the letter of notification having not been written, plus the publicity, I said, you know, I would have to be a fool to continue

along the same lines. . . . Even if I did like you.

A . . . . I remember discussing me having another attorney.

Q You don't recall me, Ms. Merritt, calling you and asking you what was happening with your case, that I wanted to be sure, that according to my file January 1988 would be --

A Okay. I'm sorry. You are correct in one thing. You spoke with my mother.

Q Oh, I'm sorry.

A I was out of town.

Q Okay. You're right.

A And then I returned the call.

Q You returned the call. Okay. Now, do you mind saying for the record who your lawyer is? I'm not -- just so we have it clear that you got a lawyer and you're being represented.

A I have a lawyer.

Q All right. And he is handling that

case, the case that we discussed, the one that you told --

A Unless I fire him.

Q (By Mr. Musslewhite) Can you think of any other conversations with me that you haven't told me about?

A With you?

Q Yes.

A I can't recall.

Q All right. As I understand it, you first filed a grievance because you couldn't get in touch with me, basically, to follow up on what we had already started.

A Well, and as I understood it. . . .

Q . . . . Have you got anymore complaints about me?

A (Laughing)

Q I want you to feel comfortable and say what you want to say. Now is the time to do it if you want to say something. I'm not trying to intimidate you.

Mr. Smoot's not. Nobody is. Do your thing.

A No. I mean, I do have to clear up something about where the case stands now, because I am not really sure where it stands.

Q Let me say, number one, I'm not your lawyer now. You know that.

A Well, no, but you wee asking me, . . .

A Well, when I talked to the attorney that I now have, first of all, I talked with his partner and I think the case got dumped on him, which I'm sure probably didn't sit too well with him. And his comment was, he said, "I could see holes in this right and left," you know, and the way he said it, there weren't that many merits in it. And I said, "Do not go forward with the case until we discuss a dollar amount, because it's not worth me going through all of this for nickels and dimes. I'm

not in it to skin anybody's hide or anything like that, but it's just not worth the, you know, it's just not worth it if it's not going to be for something substantial.

Q Substantial. I understand.

A You know, because it's going to cause me More grievance going through it than I've already gone through, and I said, "Don't proceed." So he was supposed to get with his partner and get back with me. And we've had a very -- well, anyway.

Q Difficult time getting back together?

A Yeah. And, you know, all this has come up, and I really don't know what I was supposed to discuss here because I had cases pending, and what I wasn't; and since I had a lawyer that said he had more important things to do than sit in his office and talk to me on the phone, since I had talked to him twice.

Q You're not talking about me on this one?

A No. I'm talking about Donovan, John Donavan.

Q John Donavan.

A Honey, if you want to find out all the bad lawyers -- not bad, just confused--

Q I want to say something. You're not getting a very good impression of lawyers, are you?

A -- you just turn me loose, because I can fleece them out.

Q All right.

A But -- so I got disgusted because I felt that he didn't feel like there were any merits anyway; and I think we discussed this on the phone.

Q You did tell me this.

A You know, I just kind of got, you know, I just got fed up with it, and I was going through all this and I just, you

know -- if the attorney isn't a hundred percent for you, and you're not paranoid by being a little bit intuitive -- you've got the cards stacked against you before you ever go in. And I just had decided that I didn't think it was worth pursuing.

Q Do you know whether Mr. Donovan has filed suit for you?

A He has filed suit.

Q . . . . When we first talked, didn't I tell you that I was hard to reach on the telephone? Did I say something about that to you at Nick's, and to please be patient with me? If you don't recall, don't answer.

A I recall more the laughing going on from the basketball game than I -- I don't know.

Q Okay.

A I'm not saying you didn't say it. I'm saying I don't recall.

MR. MUSSLEWHITE: All right. No further questions.

APPENDIX HH

NO. 86-44452 (CONSOLIDATED)

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	
BENTON MUSSLEWHITE	*	270TH JUDICIAL DISTRICT

NO. 87-24402 (CONSOLIDATED)

THE STATE BAR OF TEXAS	*	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
VS.	*	
BENTON MUSSLEWHITE	*	151ST JUDICIAL DISTRICT

MOTION TO CONDUCT ORAL HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HARTLEY HAMPTON appointed Custodian of the law practice of Benton Musslewhite by this Court on January 19, 1988 and the State Bar of Texas, and file this Motion to Conduct Oral Hearing and in support thereof would show as follows:

I.

Movants have received oral reports, and news articles have been published by the

Associated Press, Reuters news services and Scottish publications, which call into question certain activities of Benton Musslewhite. Specifically, those reports and news accounts accuse Mr. Musslewhite of soliciting the survivors of the Piper Alpha tragedy to employ him to represent them in wrongful death or other types of tort actions.

If these accounts are true, Mr. Musslewhite has violated this Court's Judgment of January 29, 1988. . . .

Given the potential gravity of the situation, Movants would ask that this Court conduct an oral hearing and receive testimony concerning Mr. Musslewhite's activities in Scotland . . . .

WHEREFORE, premises considered, Movants pray that this Court enter an Order by requiring Benton Musslewhite to appear at an evidentiary hearing to testify, under oath, concerning the circumstances of the

above described events, and that this Court further order Mr. Musslewhite to produce the materials herein described.

Respectfully submitted,

By S/ Hartley Hampton

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YOUNG AND HAMPTON
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S/ Steven M. Smoot

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APPENDIX II

CAUSE NO. 89-048801

BENTON MUSSLEWHITE	*	IN THE DISTPICT
	*	COURT OF
	*	
VS.	*	HARRIS COUNTY,
	*	T E X A S
	*	
THE STATE BAR OF TEXAS	*	269TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

COMES NOW Benton Musslewhite, hereinafter referred to as "Plaintiff", complaining of the State Bar of Texas, hereinafter referred to as "Defendant", and for cause of action would respectfully show the Court as follows, to-wit:

I.

Parties.

Benton Musslewhite, the Plaintiff herein, is a resident of Harris County,

Texas. The State Bar of Texas is a agency created by the State Bar act, Title 2, Section G of the Tex. Government Code (Vernon 1988 [The Texas State Bar Rules are reprinted in Appendix to Government Code, Title 2, Sect. G.]), and may be served with process by serving the general counsel, Steven Peterson, at his office in Austin, Texas.

II.

Subject Matter of Suit.

This is a suit brought directly in law and equity under the State Doctrine of "Bill of Review", attacking a Judgment entered in the 270th Judicial District Court of Harris County, Texas in the case of State Bar of Texas v. Benton Musslewhite, Cause Nos. 86-44452 and 87-22402 (Consolidated), 270th and 151st Judicial District Courts, respectively, said Judgment having been entered on the

29th day of January, 1988. Said judgment arose out of a compromise and settlement, all as hereinafter described, and will be, throughout this Petition, referred to as the "Agreed Judgment". The basis for the Bill of Review is that such Agreed Judgment was procured by the fraudulent representations, misrepresentations and fraudulent omissions of the State Bar of Texas and/or said Agreed Judgment was procured as a result of the mutual mistake of the parties, and/or the Agreed Judgment is void or voidable as being in fatal conflict with the Texas and U.S. Constitution and other statutes and laws of Texas.

D. The Fraudulent Representations or Conduct of the Defendant.

The representations, acquiescences, silences (when it had the duty to speak) and other conduct of the Defendant and its

representatives, led the Plaintiff to reasonably believe that the Agreed Judgment meant the following:

(1) That with regard to any future attempt to revoke the probation, if such grounds involved any alleged new violation of the Disciplinary Rules, Plaintiff would be entitled to have those alleged new violations processed through the Grievance Committee and thence would have the right of trial by jury, all as provided for in Sections 10 through 23 of Article 10 of the State Bar Rules.

(2) That the Agreed Judgment did not require Plaintiff to give up his modus operandi of holding press conferences in connection with controversial, high-visibility, mass-disaster and toxic tort litigation.

(3) That neither the Agreed Judgment

nor the Disciplinary Rules would prohibit the Plaintiff from discussing the handling of cases with other lawyers, by way of direct solicitation or by way of public communications (targeted to such other lawyers).

(4) That, in the event a petition for revocation of probation were filed, Plaintiff would be accorded the benefit of all the Texas Rules of Civil Procedure, including Rules 99 and 245, which give Plaintiff until the first Monday after the expiration of twenty (20) days after date of service of such petition before Plaintiff would have to respond and which would require at least ten (10) days notice of any setting of the trial upon the merits, after the Plaintiff had entered his appearance.

(5) That, in the event any petition

for revocation of probation were filed, Plaintiff would have a reasonable time in which to engage in discovery, all as specifically stated in the Agreed Judgment and as provided for in the Texas Rules of Civil Procedure.

(6) That in complying with the so-called "Referral Clause", it would not only be proper, but required, that Plaintiff become "employed" by way of the execution of a power of attorney or attorney employment agreement, before referring the case to another lawyer.

(7) In complying with the Referral Clause, the Plaintiff, after the referral was made, would, as long as the lawyer to whom the case was referred would case manage the case and maintain the file in his office, be allowed to perform work upon the case at the request of the lawyer to whom

the case was referred.

(8) That, in dealing with the Plaintiff, the Defendant would always respect and not violate the Constitutions of the United States and Texas.

(9) That, in dealing with the Plaintiff, the Defendant would not violate, or expect the Plaintiff to violate, any other laws or statutes, including other disciplinary rules such as DR 2-107.

(10) That Plaintiff would not have to disclose the probation and the terms thereof every time he uttered a public or private communication, unless a potential client or attorney for such client raised the question of potential employment; it would only be in the latter situation that Plaintiff would have the duty to disclose and discuss

the probation and its terms.

(11) That Defendant would not attempt to regulate any public or private statements made by Plaintiff directed to an audience that was "sophisticated" enough to make reasonable verification of any statements made by the Plaintiff (excluding of course in-court communications or conduct).

(12) That Defendant would not prosecute Plaintiff for the conduct of other attorneys, who were not in the employment of the Plaintiff or over whom Plaintiff had no power or right to control their conduct.

G. <u>The Actions of Defendant Constitute Fraud and/or Mutual Mistake and/or Render the Agreed Judgment Void and/or Voidable on other Grounds</u>.

The actions of the Defendant State Bar

of Texas, alleged under par. F above, were totally contrary to the representations, conduct and actions of the Defendant prior to the execution of the Agreed Judgment, on the basis of which the Plaintiff agreed to enter into the Agreed Judgment. The above and foregoing actions on the part of the Defendant State Bar, establish that the representations and actions of the Defendant, leading up to the execution of the Agreed Judgment were fraudulent; constituted fraudulent misrepresentations; constituted fraudulent omissions; and/or established that the entire Agreed Judgment was induced and executed as a result of mutual mistake and/or mistake on the part of the Plaintiff. Such actions and conduct on the part of the Defendant establish, particularly in the context of the Constitution of the United States and the law of this State, that the Agreed

Judgment is rescindable, void, voidable and/or of no effect for the following good and sufficient reasons:

(1) Said Agreed Judgment was induced by the fraudulent representations and/or actions and/or fraudulent silences of the Defendant.

(2) Said Agreed Judgment was induced by undisclosed materially prejudicial intentions on the part of the Defendant.

(3) Said Agreed Judgment was the result of the mutual mistake of the parties.

(4) The Agreed Judgment was a result of the reasonable mistake on the part of the Plaintiff.

(5) The Agreed Judgment is void because the Referral Clause, as it is construed by the State Bar of Texas, violates DR 2-107 of the Disciplinary

Rules.

(6) The Agreed Judgment is void or voidable because it violates DR 2-108, which prohibits any agreement restricting an attorney's right to practice law (the Agreed Judgment does do this with regard to the probation, the Custodian and the Referral Clause).

(7) The said Agreed Judgment is void because it contains punishments and restrictions upon Plaintiff which are not permitted by the State Bar Rules (particularly the Referral Clause and Custodian restrictions). See State Bar of Texas v. Edwards, 646 S.W.2nd 543 (Ct. of App., Houston [1st Dist.] 1982) ref. n.r.e.

(8) The Agreed Judgment is void because it permits the State Bar to violate the First Amendment of the Constitution of the United States (if

the construction of the State Bar is to be accepted) by punishing Plaintiff for the exercise of his right to hold press conferences and engage in free speech.

(9) The Judgment is void or voidable because it permits the State Bar of Texas to violate the Due Process clause of the Constitution of the United States, if applied as suggested by the State Bar, because it allows the State Bar to prosecute the Plaintiff in a revocation proceeding without adequate notice, without allowing him time for discovery, without allowing him time to get an attorney and without giving the Plaintiff the required notice of trial on the merits of the revocation proceeding was set.

(10) The Agreed Judgment is void or voidable because it violates the Due Process clause in that, as construed by

the State Bar, it deprives the Plaintiff of the right to a hearing before the Grievance Committee and a right of trial by jury, on any alleged new violations, as provided for in Sections 10-23 of Article 10 of the State Bar Rules. Thus, as rights created by State law, the failure of the Agreed Judgment to accord Plaintiff those rights, violates the United States Constitution. See Logan v. Zimmerman Brush Company, 455 U.S. 422, 71 L Ed 2d 265 (1982).

(11) The Agreed Judgment is void or voidable because, as construed by the State Bar of Texas, it allows the State Bar to selectively prosecute the Plaintiff in violation of the Equal Protection and Due Process clauses of the Constitutions of the United States and Texas.

(12) In a general sense the Agreed Judgment is void or voidable because, as construed by the Defendant State Bar, it allows the State Bar to effectuate a prior restraint upon free speech on the part of the Plaintiff, in violation of the First Amendment of the Constitution of the United States, the Due Process clause, and the Constitution of the State of Texas.

(13) The Agreed Judgment is void and/or voidable because, as interpreted and enforced by the Defendant, it violates the Vagueness doctrine, and the constitutions of the U.S. and Texas, in three respects: (a) the Referral Clause, which did not provide the mechanics for "referring cases", was, as construed by Defendant given an ex post facto and vague impact; (b) the construction of the Agreed Judgment by

the Defendant, so as to preclude a jury trial and grievance committee review, renders it unconstitutionally vague; and (c) the Defendants construction of DR 2-101, as a vehicle to enforce the Agreed Judgment, so as to make communications to other lawyers subject to discipline and thus a ground for revocation, renders DR 2-101, and thus the Agreed Judgment, unconstitutionally vague.

With regard to all of the above, the Plaintiff would not have entered into the Agreed Judgment had it known that the State Bar would take the positions it took with regard to the revocation proceedings and the Plaintiff would show that he was induced to enter into the Agreed Judgment by the fraudulent representations and actions of the State Bar, by mutual mistake and, by the manner in which

Defendant procured such Agreed Judgment through the use of such undisclosed prejudicial intentions.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays the State Bar of Texas be cited to appear herein as required by law and, upon hearing and trial hereof that the Plaintiff have judgment rescinding and declaring void the Agreed Judgment and all proceedings stemming therefrom and/or in the alternative reforming the Agreed Judgment as requested in this petition; furthermore, that the Defendant be ordered to show cause, if any it may have, why a temporary injunction should not be issued, and, upon the hearing, that the Court grant a temporary injunction, enjoining the enforcement of the suspension provisions of the Agreed Judgment and the Revocation Judgment based thereon, pending the entry of final judgment in this cause;

and Plaintiff further prays for actual damages, attorneys' fees and costs of court and such other and further relief to which Plaintiff may show himself justly entitled to receive.

Respectfully submitted,

S/ Benton Musslewhite

Benton Musslewhite, Pro Se

VERIFICATION

STATE OF TEXAS *
*
COUNTY OF HARRIS *

BEFORE ME THE UNDERSIGNED AUTHORITY, appeared Benton Musslewhite, known to me, and after first being sworn, did upon his oath state, swear and affirm as follows:

> "That I am the Benton Musslewhite, Pro Se and that I have personal knowledge of the relevant facts; that I have read the foregoing Motion and that the matters and facts therein stated, are true and correct."

s/ Benton Musslewhite
Benton Musslewhite

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public, this the 16th day of November, 1989.

s/ Janet A. Hays
Notary Public in and for
The State of Texas

My Commission Expires:
10/19/92